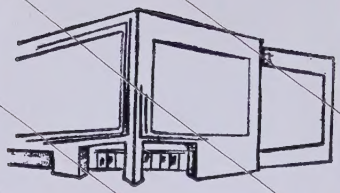

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JOSEPH LACY SEAWELL
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The following material in this volume is printed in this edition by kind permission of the *New York Times*, New York City, N. Y., U. S. A.:

Old Yesterdays in Court.
Watermelons and the Common Law.
The Doctor Whose Patients All Died.
A Bulldog and Secession.
How a Law Book Caused a Historic Duel.
Earmarks Personal and Earmarks Official.
A Southern Negro Who Prepared White Youths for College.
Article Relative to the Birthplace of Andrew Jackson.

LAW TALES for LAYMEN

By

JOSEPH LACY SEAWELL

For thirty-eight years connected with the
Supreme Court of North Carolina
as Office Boy, Deputy Clerk
and Clerk

Alfred Williams & Co., Publishers
Raleigh, N. C.
1925

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DEDICATION

This volume is dedicated to him who made
it possible and who has made many
greater possibilities in many
greater lives:

JAMES KING HALL

physician and friend

Foreword

The literature of a country, a state or a nation, is the index of its civilization. As society becomes more complex and highly organized, the forms which the literature assumes become correspondingly more varied and diverse. A mark of the renaissance of letters in the South today is the number of types of literature now being produced by Southern writers.

This volume by my friend, Joseph Lacy Seawell, is unique in the annals of North Carolina literature. By our native writers no little has been done in history and biography; and a few figures have made notable contributions in fiction, the short-story, poetry, belles-lettres, and literary criticism. But little has been done in the field of autobiography and reminiscence. And nothing, I believe, has been done hitherto by any North Carolinian in the particular field traversed by Mr. Seawell. All the more reason for welcoming this late comer in a new field.

In the neglected tomes of legal record and court proceedings lie, as yet unrevealed, some of the most fascinating stories of human destiny and individual experience. Some years ago Wallace astounded the world by the discovery of revealing legal documents in the London Public Record Office, bearing on the life of Shakespeare. Only the other day, a young Harvard scholar, Hotson, following the alluring clues of extant knowledge, unearthed extraordinary legal documents minutely describing the circumstances, hitherto known only from the tongue of rumor, of the taking off of Christopher Marlowe. In repositories of law suits and processes,

long hid from public view or overlooked by the meticulous and painstaking scholar, still lie many marvellous tales of human weal and woe, humorous, pathetic, comic, tragic, awaiting only the pen of the narrator to give them color and life.

Through his intimate acquaintance, covering a period of almost four decades, with the legal records of North Carolina, Mr. Seawell has discovered many stories and incidents, of historic and dramatic interest, which supply the materials of literature. And in addition to these stories, narrated with eloquence, humor and charm, he has told other stories which lie more upon the surface of our knowledge—of Andrew Jackson, grim paladin of force and courage, of John Chavis, remarkable negro teacher of famous white men, of the strange case of Joseph Butler, of the origin of the term "Lynch Law."

This volume, aptly entitled "Law Tales for Laymen," is a social document of genuine importance, as well as a work of vivid human interest.

ARCHIBALD HENDERSON.

"Fordell"
Chapel Hill, N. C.

Introduction

IN the courtroom alone is life truly dramatized. Humanity is interested most in human nature, and perfect revealers of human nature are cause and motive which invoke the law of the land. Serving primarily to stabilize the law in observing the doctrine of *stare decisis,* yet showing vividly and accurately economic, political and social conditions, the court records of any people are the source of their most authentic history.

Witnesses in the trial of a case, narrating instances relevant to the issues, present local conditions and customs; the narrators die and are forgotten, but their manner of life, their neighbors' manner of life, the acts, aspirations and achievements of all who then lived, remain as true portrayals of the eventful and the uneventful past.

Court trials often evolve stories which transcend rarest imagination, sequenced by joy from success and gain and grief from defeat and loss; for every trial is resultant of both gladness and woe, of hope and frequently despair.

"The geologist, examining a lump of coal, can discover the species of trees of which it was composed eons ago. The layer of sandstone or of marble will show the raindrops and the footprints of passing animals when these subjects were yet plastic with heat. Amber and other substances retain the insects which lighted upon them. From these substances

the scientists can rebuild the story of thousands of years ago, when man, or semi-man, or beast, was floundering in the bogs and swamps where now stand the solid hills or spread out are the smiling plains. So in the dry records of legal proceedings is embalmed many a tale of wrong and of woe which can be deciphered by some future historian."*

Old records which show long retention of a cause suggest tales of harassment from hope deferred, justifying Dickens' "Jarndyce and Jarndyce," "this scarecrow of a suit," as he describes it, "which in the course of time has become so complicated that no man alive knows what it means. Innumerable children have been born into the cause; innumerable young people have been married into it; innumerable old people have died out of it. The little plaintiff or defendant who was promised a new rocking horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse and trotted away into the other world."

A court is the center of vital human interests; its records are receptacles of drollery, pathos and tragedy—concreations of

> "The pitiless mingled din
> Of those who lose and those who win."

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*Chief Justice Clark in Miller v. Bank, 176 N. C., 156.

Old Yesterdays in Court

INCOMPARABLE, if one exists, is the ingleside in any public office today with that in the office of the Clerk of the Supreme Court of North Carolina thirty-eight years ago. The Clerk's office was then the out-of-town lawyers' loafing place, and there they lingered sometimes the entire afternoon, especially in winter. Good-fellowship, stories, personal experiences—droll and dramatic—and rare repartee prevailed over professional controversies, as these congenial brethren of the bar incessantly smoked and chewed tobacco.

The embryous tyranny of the telephone was the fascinating novelty of a toy; the process of transcription had quickened only from quill to Spencerian pen, and masculine officialdom was still unimpaired. Hence a habitat dearth of telephones, typewriters, women, electric lights and heating-pipes. In lieu of utilities of a busier but less happy day—large gas chandeliers, a big fireplace with a blazing fire and comfortable seats all around. Tenfold court business, science and the suffrage amendment have long since rendered such environments and social conviviality impossible and intolerable. But anyway and alas! such charming loiterers are now no more; "they have all dispersed and wandered from the fireside's ruddy glow and some have reached a fairer region far away." But by a boy who listened and remembers they are still seen in more than "shadowy design," as by

> "One who cons at evening
> O'er an album, all alone,
> And muses on the faces
> Of the friends that he has known."

Chapter I.

WATERMELONS AND THE COMMON LAW.

"Dat's de best white man and de wust cusser whut cums here. He's perlite ez er nigger tryin' ter beg outer jail. Dat's Cap'n Bill Day fum Weldon." Uttered by the black messenger of the Supreme Court of North Carolina after a portly, well-attired man had hurriedly passed through the Clerk's office and entered the courtroom. William H. Day, sui generis, indescribable; personification of antitheses; fiery and courtly; high tempered and tender; profane, eloquent and cultured, a gallant ex-Confederate Captain and a great trial lawyer. Here is his famous defense in the Superior Court of Halifax County of a negro who was charged with having stolen a watermelon. There was conclusive evidence of the negro's guilt, but Captain Day introduced no evidence in rebuttal and did not permit the defendant to go on the witness stand. The docket was crowded and the trial Judge, seeking to utilize time, intimated that he would charge the jury that if they believed the evidence they should render a verdict of guilty. But Captain Day insisted on a hearing and he addressed the jury as follows:

"Jurymen, consider this remarkable circumstance! Here is an attempt to send to the chain-gang an humble, inoffensive nigger, born and reared in a log cabin in Halifax County, for just pulling and eating a watermelon and going on about his business. It is preposterous! It is unjust; it is against public policy; it contravenes the very law of nature and of nature's God to convert a plow hand into a convict just for a ten-cent watermelon. Why, gentlemen, there is an ever-

lasting—a divine—affinity between a nigger and a mule and a nigger and a watermelon. What God has joined together let no man put asunder. You have been sworn to try this man according to the evidence, and the evidence is against him. But evidence of what? Evidence that he did only what I defy every man on this jury to deny he himself has done—just took a watermelon without asking for it! Who can doubt that, had he wasted time to ask for it, it would have been given to him unhesitatingly? So what harm has been done? What evil has been wrought? The law is intended to punish and prevent crime, but what crime has there been here committed? The indictment charges that this man stole a watermelon.

"How stole a watermelon? Gentlemen, you cannot steal a watermelon in Halifax County! Law is 'the perfection of human reason.' Law is common sense and common law is founded on common customs, the beginning of which antedates the memory of man. Where is the man living in Halifax County today who can remember that a nigger or any one else ever went to jail for stealing a watermelon? Under the common law as it obtains in this grand old county, cradle of freedom and liberty,* there's no such crime as stealing a watermelon. If so, all of you are miserable thieves and should wear a felon's garb. Yes, gentlemen, this grand old county still retains some vestige of its pristine glory and it still adheres to the principles of liberty and justice. Under the common law of Halifax County you cannot steal a watermelon! Watermelon: delicious, delighting, full-filling! As compelling to humanity as the nectar of the wild rose

*The Provincial Congress of North Carolina assembled at Halifax declared independence of Great Britain April 12, 1776.

to the assiduous bee; as irresistible to man and beast—to white folks, niggers and hound dogs—as the forbidden fruit to our first parents in the dawn of creation.† But for Holy Writ that it grew on a tree instead of a vine, easily might we imagine a watermelon, instead of an apple, as the fruit which tempted Eve. But ah, no! watermelon is not included in forbidden fruit; eating it is fraught with no sin. Why should not a harmless, hard-working nigger, whose only prospective is a mule's tail and the long, weary furrow, pause in his arduous toil, dash with his forefinger the honest sweat from his brow and assuage his thirst and gnawing hunger by eating a watermelon?

"Gentlemen, would you cast backward the strong, relentless arm of the law and profane the hallowed days of your boyhood? Has there faded from the walls of your memory life's dearest picture? Do you cease to

> "Hear the little spring brook fall
> Over the roadside, through the wall?

"Don't you remember, oh! don't you remember, how

> "Oft when the Summer sun shone hot
> On the new-mown hay in the meadow lot

"you hied away to the placid, sequestered old swimming pool, and there dived and ducked, and from whence later you crept in suppressed excitement and boyish glee and pulled a long, luscious, slick, shiny watermelon—the biggest you could find—thence back to the pool, where you splashed and 'skeeted' water while the melon floated and cooled in the

†Dogs have a keen relish for watermelons and persimmons, though of course they never attempt to eat an uncut melon.

eddies beneath the drooping willows, then carried it to the bank, burst it against a rock, and with eager, innocent fingers gouged out its red meat and partook of its inward sweetness? Ah! no, gentlemen, you cannot forget. 'Whatsoever things therefore ye would that men should do unto you, do ye even so to them; for this is the law.' Yes, gentlemen, the Great Book—the highest, most authoritative guidance for man's rule of conduct—says 'this is the law.' Gentlemen, turn this nigger loose." Despite the Judge's charge there was an acquittal.

Chapter II.

THE FIRST BLOOD SHED ON ACCOUNT OF SECESSION.

SETTLING lower in an armchair in the clerk's office and placing his feet nearer the fire, "Well, Kenan," said the elderly ex-Confederate soldier, "the war has been over more'n twenty years, and, by granny, Virginia and North Carolina are rowin' over who was the first Southern man killed. Virginia claims that the first Southern man killed was a Virginian, and North Carolina claims that the first Confederate soldier killed was a North Carolinian. They are both right, but they keep on fussin'. I was talking about it with Judge Clark today. He says that the first Southern man killed was a Virginian—a man named Marr—but that he was in citizen's clothes when he was killed on the streets of Warrenton, Va., and that he was not killed during a battle, but was struck by a stray bullet from the Yankee cavalry as they dashed through the town, firing right and left.* That the first Confederate soldier killed in battle was Henry Wyatt of North Carolina during the battle of Bethel, which occurred a few days after Marr was killed. But even Judge Clark didn't know till I told him that the first blood shed on account of secession was from the veins of a North Carolinian, and that it occurred not more'n one hundred yards from where I'm sitting right now and hardly more than ten minutes after the ordinance of secession had been adopted in the room right upstairs. But Judge Clark said that what I told him was too shocking to be published."

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*Incorrect. Marr was a soldier and was killed while discharging military duty, but he was not killed in a regularly drawn battle, as was Wyatt.—J. L. S.

"Shocking! Why?" inquired the person addressed, ex-Colonel Thomas S. Kenan, who was then Clerk of the Supreme Court.

"Well, that's what I wan'er know," replied the narrator. "My story is natcherly more entertainin' than what they tell about that man Marr or Wyatt either."

"Well, what kind of a yarn did you tell Clark, anyway?" inquired the Colonel.

"It's no yarn, man; why, dern it, it's history, facts—bare facts!"

"Well, let's hear it; I don't understand how it could have been any one except Marr, the Virginian, who shed the first blood on account of secession."

"Marr, the devil! That's just where you and everybody else who tries to tell about this thing gets it all wrong."

"Then, who was this unknown hero who shed the first blood for the Southern Confederacy?" inquired the Colonel.

"Well, maybe he wasn't a hero when it happened, and maybe his blood wasn't shed exactly for the Southern Confederacy; but it was all on account of secession, and he was acting under orders as a Confederate soldier and he bled and he suffered; so what more do you want? It was Wiley Sauls of Wake County. He was attacked in the rear—ab-so-lootely in the rear, I tell yer, and it wasn't no Yankee who done it, either."

"Then, who was it?" inquired the thoroughly interested Colonel.

"Oh, you wait now; let me tell it just like it happened. Ramseur, who was then a major of artillery at the training camp near here, which was commanded by General D. H. Hill, had stationed a battery on the west side of the Capitol

fronting Hillsboro Street, and he was to fire salutes when a signal was given from a window upstairs, the signal to be given right after the ordinance of secession had passed. Raleigh was full of outsiders, and a band from the camp played sprightly tunes and kept the big crowd which had gathered in the Capitol Square sperited up. All the respectable-looking youngsters were jubilant and garrulous, while some of the old fellers looked kinder anxious and sad. I noticed on the edge of the crowd, near the big guns, some sour, tough-looking roughnecks, who didn't have nothin' to say.

"They were from Newlight Township, and you know Newlight was a regular nest for deserters during the war. About 12 o'clock, I reckon it was, a handkerchief waved from a window upstairs—I was lookin' straight that way and I saw it. I also saw at the same time the United States flag on the flagpole on the north end of the Capitol begin to come down, and when the Confederate flag was half-way up the pole I heard Ramseur give the command, 'Fire!' Man alive, it was a jarrer. My battery was in the big artillery duel at Gettysburg, but, till the time I'm telling you about, that salute to the Confederate flag was the loudest noise I had ever heard, and it made my blood tingle and I went plumb wild.

"Everybody yelled except those fellers from Newlight, and I could see some people crying and their mouths open a-yellin' at the same time. Wiley Sauls was one of the gunners, and while he was swabbing his gun I saw him drop the ramrod, stand on his tiptoes and hump the middle of his body forward and throw both arms behind him. Then he whirled around with his back toward me and—"

"Oh, go on!" said the impatient Colonel.

"Well, it was shocking, sure enough. Danged if a big, bench-legged bulldog didn't have Wiley right in the seat of his britches and was bearing in on his meat. You see, the dog had been prancing back and forth right behind Wiley unbeknownst to him, and in one of Wiley's backward movements the end of the ramrod had tuck the dog right between the eyes and set him on his hind legs. Wiley twisted and reached behind after the dog and then pawed the air in front and tried to move forward, but the dog held on and shook his head and gnawed deeper.

"Ramseur was a West Pointer, and he shouted at Wiley, 'Back to your post, gunner, and prepare to fire!' But Wiley yelled, 'Damn the post! Let somebody take this devilish tiger offern me!' The crowd became so thick I couldn't see how Wiley got rid of the dog, but some more salutes were fired, and when the crowd had thinned I saw Wiley hung front forward over a gig which was moving slowly down Fayetteville Street. A cloth sack partly covered him, but I could see blood on his britches, and he certainly looked like a wounded soldier. Anyway, he served as a brave soldier all through the war and came out with no visible scars, but he must have had some just the same. And he never liked dogs no more."

"But that ain't all," continued the narrator; "the very next day Shad Moss shaved for the first time in twenty years."

"Shad Moss shaved! What's that to do with it?"

"Why, Shad owned that dog and Shad wore a long red beard, and when Wiley went hunting for the dog his hands got tangled in Shad's beard, and the shaggiest part of it was pulled out, and his beard looked so scarified that his wife made him shave it all off."

Chapter III.

THE DOCTOR WHOSE PATIENTS ALL DIED.

THIS story has to do with a lawyer who spake for his client and spared not his friend. But, first, of the many Taylorsvilles in the United States and doubtless elsewhere, perhaps only in Taylorsville, North Carolina, was it ever customary to proclaim the opportunity to buy fresh beef by ringing the courthouse bell. This Taylorsville—snuggled among the foothills of the Blue Ridge—was then a sleepy, self-satisfied burg, inaccessible by the motor power of steam or gasoline, but it is now noticeably affected by the commercial activity which has recently rejuvenated the Old North State from the mountains to the sea.

Taylorsville in North Carolina was the home of the great trial lawyer, Romulus Z. Linney, whose unique personality and fame as a forensic orator burst the bounds of his native hills and State when he was elected Congressman in 1894 and became, for a comparatively brief spell, a conspicuous national figure. Above the front door to the main building of the Appalachian Training School in Western North Carolina, to which he was a generous contributor, is this quotation from one of his memorable addresses: "Learning, the handmaid of loyalty. A vote governs better than a crown." Zest might be imparted to the following anecdote which reveals Mr. Linney's original methods of cross-examination, were it possible to convey even a meagre conception of the keen fascinating pitch of his voice—ever laboring under the high power intensity typical of Roosevelt and evincing no partiality between portentous and trivial utterances.

His intimate friend, Dr. Long, had been summoned from the adjoining county of Iredell to testify against the interests of a client of Mr. Linney, who had filed a caveat to the will of an old lady, the caveat being based on the ground that she was mentally incapable. The jury were rugged countrymen from the isolated hills. Dr. Long, of sombre and stately mien, whose flowing snow-white beard and bodily structure were peculiarly appropriate to his name, had approached the witness chair with deliberate, elephantine dignity, comfortably located his person, qualified as an expert, and testified with an air of finality that he had been professionally and personally well acquainted with the testatrix and that, in his opinion, she was of sound mind and mentally qualified to devise her property. Counsel for propounders having announced, "The witness is with you, Mr. Linney," that gentleman focused his penetrating eyes upon the complacent doctor and questioned him as follows, the last word of each interrogatory being accentuated by a rising inflection:

"Excuse the necessity of a slight repetition, but what is your name? What is your age? Where do you reside, and what is your avocation?"

There was a glint of surprise and indignation on the countenance of the witness; he was well known by the lawyer and in the neighboring community, though (as Mr. Linney surmised) not so well known by all the jurymen. But he slowly growled:

"My name is Jabez Long; I am 65 years old; I reside in Statesville, and I am a practicing physician."

"Ah! A really practicing physician; and how long have you practiced?"

"Thirty-eight years."

"T-h-i-r-t-y-e-i-g-h-t years! And have you practiced medicine in this county?"

The witness glared at the lawyer and answered doggedly:

"Not extensively; my practice has been almost confined to Iredell County."

"Ah! I am well acquainted with many of the good people of Iredell; let me see—did you ever practice in the family of Mr. John Alexander?"

"I did."

"You did; what do you infer by did? But that reminds me; I do not recall having seen Mr. Alexander recently. Has he moved from Iredell County?"

"Alexander is dead. You attended his funeral."

"Dead! You don't tell me. And did you attend him in his last illness?"

"I did."

"And he died?"

"I have just answered that question. You know he is dead; but he—"

"Tut! Tut! Never mind about that; oblige the court by confining your reply to the scope of my inquiry. And Mr. Alexander's good wife, I knew her as a winsome maiden; has she removed from Iredell County?"

"She is dead."

"Dead! Indeed! And did you attend her during her last illness?"

"I did. But you know yourself that was twelve years ago and she—"

"Oh, that is quite sufficient; we are not tabulating dates. You administered to the physical ailments of Mistress Alexander and she died? She died, did she not?"

"Oh, yes, she died; she was—oh, all of us have—"

"And Mr. Reuben Hinkle, that splendid specimen of vigorous manhood—I do not recall having recently observed his benign countenance—is he, too, a victim of your professional skill? Were you ever his physician?"

"I was Reuben Hinkle's physician, and he is dead; but I protest against—"

"So Mr. Hinkle sleeps with his fathers and you tried to cure him?"

Vigorous objections by opposing counsel are not here noted, but similar inquiries by Mr. Linney concerning numerous deceased persons slipped by—the trial judge evidently enjoying Mr. Linney's methods—and all of the witness' answers disclosed the information that he was the attending physician of many who had departed this life. But it was worse, and the witness became pallid from rage when Linney soared to a high key, stuck his finger toward the witness, and loudly inquired, "Just what measure of success have you acquired, anyway, in treating afflicted humanity? Dead! Dead! They are all dead. You practiced your profession on every person I have mentioned, and they died! They d-i-e-d!"

And then, in addressing the jury—"Why, gentlemen, this grizzled, pompous, bewhiskered old patriarch has the consummate and astounding egotism and effrontery to pass judgment on the mental qualification of that poor unfortunate woman to apportion her vast estate, when he admits under solemn oath that he attempted to cure every person I named and that they died."

Those who knew Mr. Linney were not surprised that his compelling loquacity appeased the outraged feelings of his friend, the doctor, and that the doctor himself afterward related the occurrence as a good joke on himself.

Chapter IV.

WHEN THE HUMAN EAR DETERMINED MORAL AND SOCIAL STANDING.

BITING HARDSHIPS.

IN North Carolina, less and somewhat more than a century ago, the status quo of the human ear was a determining factor of moral and social standing. This member was a preferential objective alike in the administration of certain branches of the criminal law and the infliction of personal violence. Perhaps this followed the hand of even nature itself, for criminologists assert that abnormally small ears are indicative of thievery. Anyway, the foregoing and the following may suggest the origin of the word "earmarks."

Dexterous action is thus tersely stated in Crawford's Case, 13 N. C. Rep., p. 425 (decided in 1830): "Munroe struck Crawford, whereupon Crawford threw Munroe down and immediately bit off his ear." There is not the slightest indication of bungling or unnecessary delay: Munroe's fall and the loss of his ear appear to have been *eo instanti*. The reported decision of the Court does not intimate that the occurrence was at all unusual or ultra-indecorous; it merely states that "the *corpus delicti* is complete if the maim be committed on purpose and with intent to disfigure, although without malice prepense."

Girkin's Case, 23 N. C. Rep., p. 121 (decided in 1843), is another indictment against a human "cropper." It is charged that Horace Girkin "unlawfully and on purpose did bite off the left ear of James Watson." The Court's decision discloses a nicety of distinction in holding that the gravamen of the

crime of mayhem is physical disfigurement rather than the intensity of physical pain inflicted. Passing on the principal point presented, it is stated that, to constitute a maim by biting off the ear, it is not at all "necessary that the entire ear be bitten off; it is sufficient if a part only be taken, provided enough be taken to alter and impair the personal appearance and to render the victim less comely."

TOOK JUST THE END—NO HARM INTENDED.

The court records of Tennessee (then a part of North Carolina) for September, 1793, attest, "Whereas, in an affray that happened between Wm. Pillows and Abram Denton, in fighting, the said Pillows bit off the upper eend of Denton's right *year,* upon which sd. Pillows *come* into court and the sd. Pillows openly declared that he bit *of* his *year* aforesaid, without any intention of injuring sd. Denton."

NO BLOWS AND NO NOSE.

And "Andw. Wickerham b'ng sworn, sayth yt he saw Wm. Hamilton go to turn ye Deft. out of his house, on which ye. sd. Deft. resisted; & they laid hold on one anoher and fell, ye plff. uppermost; and when they were parted, he saw yt ye sd. plff.' nose was bit off, but saw no blows pass. Jas. Buchanan and Wm. Simpson corroborated ye ab've."

There were more barbarous mutilations by the hand of the law. The records of the Superior Court for the District of Washington, held at Jonesboro (then in North Carolina, now in Tennessee), August term, 1790, show that Elias Pybourn was convicted of horse-stealing and it was adjudged that he be placed "in the public pillory one hour; that he have both his ears nailed to the pillory and severed from his head; that

he receive at the public whipping post thirty-nine lashes well laid on, and be branded on the right cheek with the letter H and on the left cheek with the letter T." (Western North Carolina, by John P. Arthur, p. 375.)

The records of the Superior Court of Ashe County, March term, 1809, show that it was adjudged by the presiding official, Francis Locke, that Carter Whittington, found guilty of perjury, be "Fined £10 and that said Whittington stand in the pillory for one hour, at the expiration of which time both his ears be cut off and entirely severed from his head, and that his ears so cut off be nailed to the pillory by the officers and there remain till the setting of the sun." (Ibid. 376.)

EARMARKS PERSONAL AND EARMARKS OFFICIAL DISTINGUISHED.

Therefore, in consideration of the judicial custom of the age and a respectful self-regard, came Joseph Culton, at the November term, 1788, of the Superior Court held at Jonesboro and "proved by the oath of Alexander Moffit that he lost his left ear in a fight with a certain Charles Young, and prayed that the same be entered on record, and it was so ordered." (Ibid. 375.)

Likewise and moved by similar considerations came Thomas Hopper, at the October term, 1793, of the County Court of Buncombe, and it was "ordered by the Court that said Thomas Hopper, upon his own motion, have a certificate from the clerk certifying that his right ear was bit off by Phillip Williams in a fight between said Hopper and Williams. Certificate issued." (Ibid. 379.)

And even North Carolina horses had the habit; for

"This may certify that Mr. John Rose, an inhabitant of this County and State aforesaid, being with part of his left

Ear off had the misfortune to be Deprived of that by the Bite of a Malicious Mare about 12 years ago. Recorded this 30th day of September, 1786. Test Enoch Rolfe, Clerk."

(Copied from records of Pasquotank County, North Carolina, in North Carolina Hall of History.)

Thus were happily and effectually distinguished earmarks personal and earmarks official.

Chapter V.

HOW A LAW BOOK CAUSED A HISTORIC DUEL.

LAYMEN do not easily reconcile lawyers' professional hostility toward each other during a trial with the avidity with which they sometimes resume cordial and friendly relations immediately thereafter. Nor do they comprehend the spirit of the brusque and almost uncivil manner of a lawyer's cross-examination of one for whom he may entertain high regard and friendship. Indeed, there have been and are even great trial lawyers temperamentally unable to disassociate professional zeal and personal feelings, and many trials are characterized by well-meant asperity and bitterness, and hardly any *nisi prius* court whose annals at some period may not disclose personal encounters between members of the bar.

But pacificity in the trial of cases is the tendency of the present age, and even a physical combat between lawyers while engaged in a trial rarely results in lasting enmity. I enjoyed a friendly and sprightly discourse in the old clerk's office between two eminent lawyers who but a few years before were participants in perhaps the most dramatic and appalling encounter ever seen in a courtroom in North Carolina. It occurred in the Superior Court of Wake County. Enraged by biting sarcasm employed by his opponent in arguing a question of law before the court, one of these men inflicted two blows with a stout walking cane on the head of the speaker, causing him to reel and almost sink to the floor. The man who had been assaulted drew a long revolver and snapped it three times almost against the breast of his assail-

ant before the sheriff could intervene. But Divine intervention was shown when the sheriff tested the revolver in the jail yard and every cartridge exploded.

Recurring to almost Colonial history, "Bacon's Abridgement"—a law book—was the cause, or the *causa causans,* of the duel between Andrew Jackson, seventh President of the United States, and Waightstill Avery, first Attorney-General of North Carolina. These distinguished gentlemen met to engage in mortal combat August 12, 1788, near Jonesboro, Tenn., which State was then a part of North Carolina. The conflicting accounts of details do not controvert the fact that the cause of this tragic meeting originated during a court trial and that "Bacon's Abridgement" was a cogent factor. (How this commercial age would utilize such a circumstance to further the sale of a book!) The following is the less authentic, though most ludicrous, account of the cause of the duel:

Law books were then rare and expensive; Avery, a graduate of Princeton, was the proud possessor of "Bacon's Abridgement," which was his ever-ready reference book in the courtroom. References to it were usually prefaced by the remark, "Let us see how my friend Bacon has it," and Avery would then procure the volume from his saddle bags, find the citation and expound the law. Avery was Jackson's senior by several years, and their relations were cordial and friendly. Once when they were opposing counsel in a case Avery's sensitiveness was stung by Jackson's facetious remark respecting his apparent adoration of "Bacon's Abridgement," and Avery retorted, with equal effect, that Jackson had much to learn before he would be competent to criticize any law book whatever. Jackson sought retaliation by resorting to a prac-

tical joke; he substituted for "Bacon's Abridgement" a piece of thick, dry bacon, cut exactly the size of the book, wrapping the same paper around the meat which had enfolded the book, and placed it in Avery's saddle bags.

His expectations were realized. Avery in the midst of an argument exclaimed, "But let us see how my friend Bacon has it!" hurriedly dived in his saddle bags for the book, fumbled with the bundle, and out rolled the real bacon. The spirit of merriment which immediately pervaded the throng of rough frontiersmen who were spectators could not be suppressed, and Avery's impulsive remarks upon being publicly ridiculed caused a hot interchange of words with Jackson. A challenge from Jackson ensued, and Avery accepted, yielding to the custom of the times, though he was strongly opposed to dueling.

It has been related that there was an actual interchange of fire, but the most authentic account was doubtless that of the late A. C. Avery, grandson of Waightstill Avery and formerly a Justice of the Supreme Court of North Carolina. According to Justice Avery, his grandfather approached Jackson after Jackson had first fired at him without effect and delivered a lecture to Jackson very much in the style of a father to a son, and the affair was amicably closed. The practical joke concerning Bacon's Abridgement was omitted by Justice Avery, who stated that he learned from his father that the estrangement originated during the trial of a case.

Two accounts given by John P. Arthur in his History of Western North Carolina (1914) recite that Bacon's Abridgement was in one way or another the cause of a bout in the courtroom between Jackson and Avery which resulted in a duel. The text of Jackson's challenge does not mention

Bacon, but indicates plainly that the difficulty arose during the trial of a case. Here is a verbatim copy of the document as preserved in the Hall of History, Raleigh, N. C.:

"August 12, 1788.

Sir:

When a man's feelings & Character are injured he ought to seek a speedy redress; you recd a few lines from me yesterday & undoubtedly you understand me. My character you have Injured; and further you have insulted me in the presence of a court and a large audience. I therefore call upon you as a gentleman to give me satisfaction for the same. I further call upon you to give me an answer immediately without Equivocation and I hope you can do without dinner until the business is done; for it is consistent with the character of a gentleman when he Injures a man to make speedy reparation; therefore I hope you will not fail in meeting me this day from yr Hbl. St.

Col. Avery. Yrs. ANDW. JACKSON.

P. S.—This Evening after court is adjourned."

Chapter VI.

WHEN TO REST.*

ASSUMING that "the psychological moment" implies "the bull's eye" of opportunity, it occurs in the course of a court trial when it is the proper time for plaintiff or defendant to rest his case.

John Smith was financially and otherwise important in that unfrequented part of England where he lived and he was honored and respected by his neighbors. He was unmarried, and his housekeeper and one man servant were the only occupants of his home. At twilight a stranger rode to his house and asked lodging for the night. The request was granted, and next morning the servant found the stranger dead in his bed. There was nothing about the condition of the body to suggest the cause of death. It appeared that the stranger died while in tranquil slumber, and the verdict of the coroner's jury was that he died by the visitation of God. A month afterward a brother of the dead man came and identified his horse and his clothes, and the body was exhumed and identified. His brother stated that the stranger was a rich jeweler, and that it was supposed that at the time of his death he had in his possession a large sum of money and valuable jewelry. This was confirmed by the landlord of an inn in a neighboring village where the stranger had spent the night before his death. John Smith was arrested on a charge of having murdered his guest and was held for trial.

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*The writer recalls this story as having been read from some law journal many years ago, but does not remember the name of the publication.

It was rumored that the grand jury's return of a "true" bill was by a majority of one.

The prisoner was arraigned for trial, and the evidence adduced was substantially as follows: Smith and his housekeeper slept at opposite ends of the house and the stranger was given a room adjoining the housekeeper's room, and evidently formed a corner frontage of the house. It was proved that the death was caused by poison of a most subtle nature, and the stopper of a bottle which was found in Smith's house the day after the stranger's death was produced in evidence. A chemist testified that the stopper was evidently used to preserve a liquid which would lose its virtue by exposure to the air, but could not testify further as to the nature of the liquid. Another witness testified that on the night after the prisoner's death the witness passed Smith's house after midnight; that he was attracted by a light moving about the house, and he remained and watched. He testified that he could distinctly see a figure holding a light go from the room in which Smith slept, then appear in the housekeeper's room, and then the light would disappear for a moment. He could not see whether the person with the light went into the stranger's room, as the window of that room opened another way (on the end of the house), but that in a short while he saw two persons return to the housekeeper's room with a light, go along to Smith's room, and in a few minutes the light was extinguished and he saw it no more. But before the light was extinguished he had twice seen some dark object intervene between the light and the window, almost as large as the window itself, and it appeared that a door had been placed before the light. When Smith's room had been inspected nothing was found which could account

for this momentary intervention of an object between the light and the window. The housekeeper had disappeared after Smith's committal and could not be found. This closed the evidence for the prosecution, and even the prosecuting attorney did not regard it as sufficient to warrant a conviction. The trial judge stated that the evidence for the prosecution did not necessitate the prisoner making a defense, and that if the jury were of the same opinion they would at once stop the case. The jury intimated their acquiescence, and were about to render a verdict of acquittal, but the prisoner arose to address the court. He stated that he was not satisfied to be acquitted of such a heinous crime simply on the ground that the evidence was insufficient, and requested leave to explain to the jury those circumstances which appeared doubtful. Strange to say, this request was strongly seconded by the prisoner's counsel, and the court granted it. The prisoner told the jury that he wished to introduce evidence which would show the impossibility of his guilt. He reminded them that the minutest search of his premises had failed to disclose even a vestige of the dead man's property which was said to be in his possession on the night before his death, nor was there even a rumor that he (the defendant) had ever possessed poison of any kind. He explained the housekeeper's presence in his room on the fateful night by saying that he had for years been subject to sudden spells of sickness, and had an attack from these spells that night and went to the housekeeper's room for aid. That he waited in the passage for her to dress, handing the light to her, which accounted for its momentary disappearance. That the housekeeper remained in his room until he was more comfortable, and he then dismissed her for the night. That fearing his

enemies might influence the housekeeper during his imprisonment, he kept her out of the way until the present time, and would now introduce her as a witness. She was conducted to the courtroom, and on examination by the prisoner's counsel repeated almost in the prisoner's words the statement concerning his sudden illness and his calling her during the night. Counsel for the prosecution then took the witness. He had attached importance to the testimony that something like a door had intervened between the light and the window. He knew that the woman had heard none of the testimony, and he began his cross-examination as follows:

"During the time you were in Mr. Smith's room the candle stood on the table in the corner of the room?"

"Yes."

"Was the closet or cupboard, or whatever you call it, opened once or twice while the light was in the center of the room?" There was a pause and no answer.

"I will call it to your recollection: After Mr. Smith had taken the medicine from the closet, did he shut the door or did it remain open?"

"He shut it."

"Then, it was opened again for the purpose of replacing the bottle, was it not?"

"It was."

"Do you recollect how long it was open the last time?"

"Not more than a minute."

"The door when open would be exactly between the light and window, would it not?"

"Yes."

"I forgot whether you said the closet was on the right or the left of the window?"

"The left."

"Can you speak positively of the fact? Have you ever opened it yourself or only seen Mr. Smith open it?"

"I never opened it myself."

"Did you keep the key?"

"Never."

"Who did?"

"Mr. Smith."

At this moment a glance at the prisoner caused the witness to swoon away. The prosecuting counsel's motion that there be an adjournment of three hours was granted. During that time the prisoner's room was explored, and a mechanic discovered a secret closet and found there all the dead man's missing property. There was also found a bottle from which the stopper was missing. A physician pronounced the contents of the bottle a deadly poison. The whole story of the crime was then elicited from the housekeeper, and the prisoner was convicted and executed.

Chapter VII.

How a wonderful voice prevented religious worship.

THE judicial annals of North Carolina disclose no case more strangely ludicrous than State vs. Wm. Linkhaw, 69 N. C. Rep. p. 214 (decided in 1873). It presents the singular and sole instance of a man being indicted for disturbing religious worship while conscientiously endeavoring to take part in the exercises. William Linkhaw, of Robeson County, was a pious member of the Methodist church, but he was no singer. "Make a joyful noise unto the Lord" admonishes the psalmist; "make his praise glorious." William made it roarous. A portion of the congregation was infuriated, another convulsed. He was expostulated with by the stewards, but to no avail. With that stubborn soul of ancient Methodism, he stoutly maintained his right to worship God and that as part of that worship it was his bounden duty to sing, whether he could or couldn't. Matters grew worse. William seemed to actually glory in his infirmity. His pious zeal to praise his Maker was apparently augmented by the disturbance it caused—the more they laughed and fussed the louder he sang. Religious revivals and protracted meetings became impossible, William's clarion but strident voice invariably changed the atmosphere of most profound solemnity to one of mingled hilarity and angry resentment. Babies ceased crying and began to coo; small boys nudged each other and laughed outright. The phenomenal increase in church attendance by the young was due, alas, not to religious awakening, but solely to William Linkhaw and his voice.

Young people flocked from neighboring communities to hear him and to enjoy the fun.

Only once did William desist. Upon concluding a solemn and apparently effectual discourse, the minister, before announcing the final hymn, requested "Brother Linkhaw" for the congregation's sake, for "Brother Linkhaw's" sake, for the preacher's sake, for everybody's soul's sake and really and reverently for God's sake not to sing. Linkhaw immediately left the church and, undeterred, the leaven of good leavened the loaf and the brethren took heart and gave mental frontage to days of serene and fervent piety. But it was a vain hope—William was back again next Sunday with a double charge of volubility. He sang louder than ever before and with a more harassing and excruciating complex.

The crisis was reached when the presiding elder refused to preach in the church on account of William and his voice. The stewards arose in their righteous indignation and indicted William for disturbing a religious congregation. Trial of the indictment adduced conclusive evidence that the disturbance was real. The presiding judge, Daniel L. Russell, requested a witness for the prosecution who was a member of the choir to sing a verse of some familiar hymn and to imitate William's voice. Compliance by the witness caused a burst of prolonged and irresistible laughter, convulsing alike the spectators and the court, the trial judge most of all. There was a verdict of guilty and the defendant appealed. The Supreme Court awarded a new trial upon an admission by the State that it was not the defendant's purpose to disturb the congregation but that he was conscientiously taking

part in the religious services, and this being so he was subject to the discipline of the church and not of the court.

The stewards having made it plain to William that he must either eliminate praise from his religious devotions or be himself eliminated from the church, he continued to worship but ceased to praise. There was marked decrease in church attendance, but the brethren acquired a new realization of the Scripture, "Where two or three are gathered together in my name there am I"—and not the devil.

William was duly translated in course of time and doubtless joined "the choir invisible." Let us hope that in a serener sphere he has been gloriously endowed with harmony commensurate with his earthly zeal and will through all eternity sing, undeterred, to his soul's content with "ten thousand times ten thousand and thousands of thousands."

A daughter of Linkhaw apparently inherited her father's fearless determination. About 20 years ago she sought out a man who had irreparably wronged her and deliberately shot him through the heart; but the community was more compassionate and lenient to her than to her father. She was never brought to trial.

It might be reasonably supposed that 36 years after Linkhaw's trial even local memory of his religious zeal would have perished from the earth. But in May, 1909, there came to my hand as deputy clerk of the court, from far away Montana, the following communication, in which was inclosed a newspaper clipping recounting this remarkable case as a recent occurrence:

"Oldham, Mont., May 25, 1909.

"North Carolina Supreme Court:

"Gentlemen: I found this piece of news in the Plain Dealer about the feller brother who could not sing. If those good people

who can sing would undertake to start a singing school and learn those who cannot sing, how much better it would be for all concerned. Besides this God would bless good singing. He says 'sing and make a joyful noise.'

Yours respectfully,

"MALCOM MARSHALL.

"P. S. This is just simply a suggestion."

"HENRY" AND HIS "WHITE FOLKS."

Chapter VIII.

MY WHITE FOLKS.

A TRUE STORY OF A GREAT LAWYER AND A FAITHFUL SLAVE.

IT is a rare feat to smuggle irrelevant and incompetent evidence to the jury and make it impregnable in defense of the prisoner's liberty or life. This was brilliantly accomplished in the trial of Henry Crichton. An anarchist bomb-tosser would not have been less selective of his victim than was apparently Henry Crichton, the venerable negro waiter.

About 11 o'clock on the morning of July 16, 1897, Henry, clad in his culinary garb and armed with a double-barrel shotgun, shuffled hurriedly from a side entrance of the hotel, walked 25 yards up Main Street, a crowded thoroughfare of Lynchburg, Virginia, suddenly paused, raised the gun to firing posture and discharged both barrels in rapid succession.

The detonations were terrifying and terrific. Country teams broke from hitching posts and dashed madly down the street. There was stampeded ingress and egress into and out of stores and a stream of people poured from the Lynchburg National Bank, where an immense plate glass window had been shattered by Henry's wild marksmanship, for a merciful providence had directed his aim above the heads of pedestrians. Henry did not move from his tracks and was immediately seized by bystanders, some of whom were rugged countrymen.

"Why, damn the nigger; what ails him? What was he shooting at? Hang him! No, pitch him down the high steps and bust his head open!"

But the erstwhile polite and peaceable old negro was rescued by the police, taken to jail, and the infuriated citizens

were quieted, though some were vehement in demanding summary punishment.

"Well, what have you to say for yourself, you crazy old fool?" demanded the young lawyer, who was daily served by Henry and who had been summoned as his counsel. "What have you got against this town? Do you know that people out there are ready to lynch you?"

"Lawdy, lawdy, Mister Johnny, I want trying ter hurt nobody but dat nasty, yaller, crap-shootin' John Wilson. He's 'sulted my gal Susy three times, atter I tole 'im ter lit Susy 'lone. He's pleged dat gal most ter death, en Susy's er good gal, Mister Johnny; Susy's egicated, Susy is, en she haves hersef gist like er white lady. En I tole dat John Wilson three times ter lit Susy 'lone. But las' night at de festivul—well, whut dat low-life, yaller, twingle-minded nigger sed ter my Susy, rite out loud—en he drunk, en cum staggerin' en cussin' rite up ter her. Well, whut he sed wud er made eny white man kill 'im ef he'd er sed it ter er white lady, en nuthin wud er bin dun 'bout it. When Jim Tolliver tole me 'bout it I got my old muzzle loader en went scoutin' fer dat nigger, en when I seed 'im I fergot whar I wus en dat dere wus eny body in de wurld but me en dat nigger. Mr. Johnny, dat yaller nigger aint nuthin but er bad white man en er mean nigger all mixed togedder."

"Henry, do you mean to say that you risked the life of every person in front of your gun—every innocent woman and child, white or black—just to resent what a drunken, irresponsible negro said to your girl Susy?"

"Mister Johnny, I want shootin' at nobody but John Wilson, en—"

"Well, you're in a devil of a mess. You'll be indicted for

a felonious assault—an assault with intent to kill—and your offense is aggravated by a general disregard for human life. You seemed to have a grudge against humanity at large. Why didn't you just beat the nigger without risking the lives of other people? The entire town is down on you. Every one thinks you were crazy drunk. The only thing you can do is to submit and take your medicine. It's a bad dose. It's several years in the penitentiary."

"Oh, Gawd! But, Mister Johnny, you ken plead fur me!"

"Plead for you; yes, but what good will it do?"

"Mister Johnny, dair aint NO lawyer ken plead like you ken."

"But I can't plead for anything but mercy, and you'll never get mercy from a jury in this county. Never. We'll submit and plead to the Governor."

"Mister Johnny, can't yer tell em 'twus all 'bout Susy, en won't dey sorter 'scuse de ole nigger? Aint er nigger got er right ter pertect his chillun same es er white man? Er nigger's chillun is jes es good ter er nigger ez er white man's chillun is ter er white man."

"Yes, Henry, a negro has a right to protect his children, but the law claims the paramount right to protect; it authorizes no one to personally avenge a wrong; certainly not when in doing so he risks the lives of innocent persons. The law assumes to protect, not to avenge or 'pay back,' and it punishes only that it may protect and that it may preserve its majesty. Sometimes, in sudden anger, we attempt to personally avenge or to 'pay back,' and those who administer the law sympathize with us and don't punish us as severely as the law says we deserve to be punished. But, Henry, a white man seeks personal vengeance in a sensible way; he

singles out his man, goes after him, and usually gets him. You went after everybody and got only yourself."

"But, Mister Johnny, won't dey sorter 'scuse me kase I'se jest er nigger?"

"Henry, I'm afraid that's the principal reason they won't excuse you—because you're just a negro."

"But, Mister Johnny, won't yer tell 'em twus all 'bout Susy, en—"

"Susy, the devil! Do you expect me to make a fool of myself on account of Susy and be laughed out of court? Why, they'd take it as a joke. But I'll do the best I can for you. We must submit and then see the Governor."

"Mister Johnny, what'll it cost me?"

"Well, there'll be the cost of the trial; aside from that it will cost you nothing in money; but it will cost you considerable in penal servitude. It'll cost you a term in the penitentiary. You will be indicted for a felonious assault with intent to kill, not for a common assault, which is only a misdemeanor. If it were for a common assault, you might be merely fined; but it's for a felonious assault, and that draws a term in the penitentiary."

"Mister Johnny, I means whut you en de guvner gwinter charge me?"

"Not a cent, you old fool."

THE LETTER.

Within a fortnight the lawyer received a surprising letter. It caused more or less jubilant profanity, coupled with an inquiry why, in the name of all that is good and holy, the dejected Henry had not during their long acquaintance disclosed to the lawyer momentous facts respecting

Henry's past life. But Henry's empassive mind was enshrouded in gloom: "Dat want nuthin, Mister Johnny; dem wus my white folks. Dat letter won't git me nowhar." And the black prisoner looked pathetically and appealingly at his counsel.

The lawyer concealed his emotion by banter and bluster: "That letter will keep you from going somewhere, you old numbskull, if I can get it to the jury. It'll keep you from going to the penitentiary, you old rowdy—trying to assassinate this town with heavy artillery, instead of mauling that nigger with a hickory stick. Why, you couldn't hit a flock of barns. Where'd you get that tiger blood, anyway? I thought you were a peaceable nigger. You've never been in a scrape before in your life. What do you think the judge and the jury will care for a nigger quarrel? I believe you were drunk, anyway. Why, you'd have killed the president of the bank if he hadn't moved his seat a moment before you fired. How do you expect me to get you out of a scrape like this? Yes, I could arrange your bail, but you'd best stay in jail and serve some of the time they'll give you. You might be the honor guest at a necktie party, anyway."

"But, Mister Johnny, you sed dat letter you gist read wud clair me ef you could git de letter ter de jury. I doan know how dat is, kase I ain no lawyer en I doan see nuthin in dat letter to mirate ovur. Ez I sed, dem wus my white folks; but, Mister Johnny, fer de Lawd's sake, you git dat letter ter de jury. Gist read de letter when you's pleadin' fer me."

"Well, I see myself reading it now. Why, the commonwealth's attorney would object before I had fairly begun, and the judge would immediately stop me."

"How cum he'd stop yer?"

"Oh, that's hard to explain to you. The judge would not permit me to even refer to the letter unless it had been admitted in evidence, and it cannot be admitted in evidence, because the letter is what you call incompetent and irrelevant evidence. That is, evidence which has nothing to do with the case, or because what I claim to be evidence, the law says is no evidence at all, so far as your case is concerned. And that is true, because the letter certainly has nothing to do with your case."

"Well, dat's curious ter me. You gist sed ef de jury knowed 'bout de letter dey wouldn't sen me ter de penitensury, en now you turns rite 'round en says de letter ain't got nuthin ter do wid de case."

"No, the letter has absolutely nothing to do with the case. There will be an indictment against you for felonious assault with intent to commit murder in the first degree. Now, tell me if that letter, which relates only to something that occurred nearly thirty years ago, has anything to do with your firing a gun down Main Street in an attempt to kill John Wilson?"

"Dat's right; I sees; taint got nuthin ter do wid de scrape I'se in. But yit you says de letter wud git me outer de scrape ef de jury knowed erbout it; en it do look lack de law wud lit er nigger whats in er scrape tell evvy thing he could en show evvy thing he could ter git his sef outer de scrape. It looks lack de law is studdin more erbout keepin' er nigger in er scrape dan gittin him out."

"Oh, the law doesn't apply to the negro race alone. The law applies impartially to every one, white or black. The law even presumes that every prisoner is innocent until he has been proven guilty by a fair and impartial trial."

"Well, don't dey hire er lawyer ter plead ginst er nigger, en—"

"There you go again. You seem to think that the administration of the criminal law is directed solely against the negro race."

"Naw, taint dat, Mister Johnny, but most prisners is niggers, en when you say 'prisner,' I natcherly thinks uv er nigger. Well, you says de law presumes er prisner's innercent till dey pruves he's guilty; what good do it do de prisner ter persume he aint guilty en den hire er lawyer ter pruve he IS guilty? En it do seem ter me de law studies more 'bout ketchin er nigger dan ketchin er white man; en it do seem harder fer er nigger ter git loose den fer er white man ter git loose. When de law ketches er nigger he goes rite ter jail till he's tried, en atter he's tried, ef he's guilty (which he most generally is), de stripes goes rite on de nigger en de nigger goes rite on de roads. When dey ketches er white man he niver sees de inside uv er jail en dey's slow es de rath er Gawd 'bout even tryin' 'im en—"

"Oh, well, even if that's true, it doesn't help us. I must think of some way to get that letter to the jury, and your wild talk has given me an idea."

THE INDICTMENT.

The records of the Corporation Court of Lynchburg, Virginia, attest: "The jurors of the commonwealth of Virginia in and for the city of Lynchburg . . . upon their oaths present: That H. W. Crichton, on the 16th day of July in the year 1897, within the said city, unlawfully and feloniously did attempt to commit the crime of murder in the first

degree, in this, to wit, that he, the said H. W. Crichton, on the day and year aforesaid, in and upon the body of one John Wilson, feloniously, wilfully and of his malice and aforethought did make an assault, and that the said H. W. Crichton, with a certain gun which he, the said H. W. Crichton, in his hands, then and there, loaded with gunpowder and leaden shot, then and there feloniously, wilfully and of his malice aforethought, did discharge and shoot at and in the direction of the body of the said John Wilson; and in his said attempt did point and aim said gun, charged with gunpowder and leaden shot as aforesaid, and then and there discharge the same at and in the direction of the said John Wilson, then and there being within shooting range and distance of him, the said John Wilson, with intent him, the said John Wilson, then and there feloniously, wilfully and of his malice aforethought to kill and murder, against the peace and dignity of the commonwealth of Virginia. . . . Indictment for attempt to commit murder in the first degree. A true bill."

Henry's escapade was harmless, but the public had been outraged. It was aggrieved, resentful and bitter. He remained in jail till the day of the trial, and his appearance as prisoner at the bar personified apprehension and fear; he was ashy and haggard. "Mister Johnny" arose, with an air of cool assurance, and, to the astonishment of the spectators and the court, entered a plea of "not guilty." He artfully concealed his gratification that six of the jurymen were Confederate veterans by asking only those jurymen the perfunctory questions and, with feigned reluctance, announced, "The prisoner is content." Having established Henry's exemplary character and corroborated his testimony that his daughter

had been three times grossly insulted by the prosecutor, the defense rested.

The prisoner's counsel was superb in boldness and dash—eloquent in fervent appeals to reason and passion. Because oratory and eloquence are "the sweet elusive fragrance—the thyme and mignonette—of things that were"; because time makes memory dull, it may be only perhaps this is what he said:

"MISTER JOHNNY'S" ADDRESS.

The only substantial thing worth living for in this sad world—the greatest prize of civilization—is a happy home. We get nothing more in this life or in the life to come. The noblest attributes of the human heart are engendered by love of home. When merging into society from his primeval state, man surrendered his personal liberty to the law, the moving consideration of the pact was the law's guarantee of a reward to man's endeavor for a peaceful home. Hence, by the law of the land, a man's home is his strong fortress—his haven of refuge; his sure protection against "the terror by night," "the pestilence that walketh in darkness," "the arrow that flieth by day," the felon's stealth and the marauder's force. But the surest deterrent of a happy home is not restrained. Of the insidious, prowling, lustful wolf of infamy and disgrace, the keeper of the home and he alone can beware. The keeper of the home is charged with vigilance and care, for the wolf having entered, his ruin is irreparable. It is vain to suppose that the law affords a remedy for every wrong. There can be no remedy for a wrong which takes that which cannot be returned or which destroys that which cannot be restored. Vengeance is born of consciousness of a

wrong the law cannot requite. A man's home is part and parcel of his soul. "What shall it profit a man if he gain the whole world and lose his soul? Or what shall a man give in exchange for his soul?" And, yea, what shall this brief span of years profit a man though he gain the whole world and lose his home? Or what shall a man give and what can the law give in exchange for a home?

When in a sudden rage, caused by even an imaginary wrong, one takes the life of his fellow-man, the law mitigates the punishment of death and inflicts a milder penalty. When an anguished and distracted victim of the greatest wrong that can be perpetrated by crime—a wrong for which the law cannot fully penalize and for which it can give no remedy—or when one who is even threatened with such a wrong —seeks personal vengeance, what then? For the white man there is the plea of "the unwritten law"; for the black man the plea of mercy. "The unwritten law" presupposes defense against the invasion of a home. Has the prisoner a home? The prisoner is a negro and he was a faithful slave.

From the relation of master and slave, as a natural sequence of its maintenance by the gentry of the old South, there grew the relation of guardian and ward. Master and slave are now no more. Guardian and ward must linger for aye. Faithful guardian and loving ward! It has been exquisitely said, "The sun of their day has, indeed, long since set, but, like twin clouds lifted high and motionless into some far quarter of the gray twilight skies, they are still radiant with the glow of the invisible orb." The issues of the war are dead. O'er countless graves where heroes sleep, nature itself, in floral beauty or waving fields of golden grain, extols forgetfulness of battles fought. But remnants

of forests effaced from the landscape's memory by carnage of battle remain deep rooted in the soil to combat the erosion of time or to spring again in newness of life. And know we well, they who once saw room and reason for two American sovereignties instead of one—just as did New England fifty years before—they who charged like demons at Gettysburg and fought like tigers at bay at Sharpsburg and Malvern Hill would contend as valiantly against foreign foes! And know we well, deep rooted in the soil of our social life are remnants of an institution forever effaced (and thank God it is so)—yet remnants which thwart and combat political hatred and strife, which engender gratitude and love that could never be born of cruelty and wrong. Memory gives as confluences of an æolian harp the croonings of my own black mammy as she held me in her arms and lulled me to sleep. In the words of Georgia's matchless orator, uttered on the brink of his grave, "May God forget me and my people when I forget her and hers." The loyalty of the Southern slave is unsurpassed! He toiled faithfully at home to sustain armies contending against his freedom and he served his master in the ranks. When freedom came, his faithfulness was not deterred.

This have I read or heard. Partaker of the horrors of Gettysburg was Tom, a slave—serving his master, a colonel. In the memorable "third day's charge"—American valor's superlative test—the master was mortally wounded. Tom stayed at his master's side in that carnage of hell and saw him breathe his last. The master was solicitous of his son, a captain in the same regiment, and Tom was besought and he promised to care for his young master and to remember his old mistress and her invalid daughter at home. Having

at greatest risk carried his senior master's body from the field and given it decent burial, Tom sought his young master and was faithful in his ministrations. Later the young master also was killed, and Tom carried his body to the old home and himself buried it in the family plot.

With freedom to Tom came dire transition to mistress and child. Widowed and orphaned, they became destitute and poor. A few short years and they changed their abode from a palatial to an humble home. For their daily bread the mistress toiled—

> "With fingers weary and sore
> And eyelids heavy and red."

Actually, on their way to the almshouse mother and daughter were met by Tom. Steady industry and thrift in a neighboring city had provided Tom with a home. This home he surrendered to his mistress and her suffering child. Tom's wife and two children were moved into a one-room house on his lot and Tom fed and clothed those who once owned him, housed, fed, clothed and nursed them till they died, and then buried them in the graveyard at their former home. There they sleep till this day.

For THIS IS NO IMAGINARY TALE! THIS IS NO FABRICATION! (Then stooping and encircling the black prisoner with one arm, raising high above his head the other arm, and flouting an open letter) HERE'S TOM; TOM IS HENRY CRICHTON, THE PRISONER AT THE BAR! Every word of my story is verified by this letter from a grand woman whose word cannot be doubted; a woman known throughout this commonwealth for her noble deeds! When I read to him this letter in his gloomy cell, the pris-

oner, in mild surprise, simply said, "Dat want nuthin; them wus my white folks." Yes, they were his white folks, and he and his kind are our black folks—ours forever; ours to encourage, ours to guide and protect!

But he is guilty! He is guilty of attempting to murder a wretch who would debauch his child! Alas, jurymen, you are helpless. You have sworn to do your duty, under our penal code, for felonious assault with intent to kill, it is your duty to imprison him for a term of years; the law is so written! You must consign him to slavery again! Take him! Imprison him! But, as for me, than do such as that to such a one as he

> "Great God! I'd rather be a pagan,
> Suckled in a creed outworn,"
> Or—
> "All of holy rites to pagan honor pay."

The minutes of the Lynchburg Corporation Court for October 6, 1897, further attest: "We find the prisoner, H. W. Crichton, guilty of a COMMON ASSAULT, and assess his fine at fifty dollars."

Chapter IX.

THE DEVIL AND DEEDS—EYE-TEETH AND SEALS.

THE law is supposed to afford a remedy for every wrong, but the people are prone to multiply wrongs rather than effectuate remedies—to make trivial doings, which are not *malum in se* (evil in themselves), *malum prohibita* (evil because prohibited).

Certainly, the law has its absurdities, its "fictions," and even its romances. Legal absurdities usually result from unreasonable regard for precedent—the precedent of form. For instance, how can one be an idle loafer, a vagrant, a do-nothing, with "force and arms"? Seventy years ago Justice Lumpkin commented as follows on a bill of indictment returned by a grand jury in Georgia which accused a man of vagrancy "with force and arms": "I was never more convinced," said Justice Lumpkin, "of the folly of sticking to form. The defendant is accused of having 'with force and arms' done what? Knocked some one down? No, but having with force and arms done nothing—strolled about in idleness. The offence itself is somewhat anomalous. Every other offence in the code charges the defendant with having done something. This with doing nothing."

Nor does one libel another nor slyly take a chicken from the roost "with force and arms." And even if such reprobates have not "the fear of God before" them, but are subject to "the instigation of the devil," what has that to do with the commission of the crime?

Seventy-one years ago, neither roughly nor profanely, but literally, speaking, the Supreme Court and the Legislature of

North Carolina knocked the very devil out of one quibble to indictments. They cut out the ancient expression, "at the instigation of the devil," or at least they made the devil unnecessary; and thirty-five years ago the Supreme Court of North Carolina held that "the peace and dignity of the State" was irrelevant. Solicitors in drawing indictments have about turned "the devil" loose, but they still regard "the peace and dignity of the State."

A deed is frequently called an "indenture," because in the ancient past a written instrument conveying land was prepared in duplicate, side by side, on the same sheet, a copy being given to each party after the copies had been cut apart by a curved or indented line. Or sometimes the copies were written on different sheets of paper and placed together and the margins indented by a notched cut or a line so that the two parts might be identified when placed together.

No appellate jurists in this country have, with enticing originality, tanged the insipidity of legal diction and, within the jungle of precedent, "lop't the mouldering branch away," as have Justice Lumpkin and Chief Justice Bleckley of Georgia. Respecting the history, origin and present worthlessness of seals, which many jurisdictions still hold are essential to the validity of certain legal documents, Justice Lumpkin said, in 1853: "Lord Coke defines a seal to be wax with an impression, and this has been adopted as the common-law definition. But it is a curious fact that there is neither an Act of Parliament nor an adjudged case, up to Lord Coke's day, to bind the courts as to what constitutes a seal. His opinion was probably founded upon the practice of the country in his day. New York and most of the States north have held that a seal is an impression upon wax, wafer or

some other tenacious substance, capable of being impressed. In Pennsylvania, New Jersey and the Southern and Western States generally the impression upon wax has been disused, and a circular, oval or square mark, opposite the name of the signer, is held to have the same effect as a seal, the shape of it being altogether indifferent. It is usually written with a pen, sometimes printed. The truth is that this whole subject, like many others, is founded on the usage of the times and of the country. A scroll is just as good as an impression on wax, wafer or parchment by metal, engraved with the arms of a prince, potentate or private person. Both are utterly worthless, and the only wonder is that all technical distinctions growing out of the use of seals are not at once universally abolished. The only reason ever urged at this day why a seal should give greater evidence and dignity to writing is that it evidences greater deliberation and, therefore, should impart greater solemnity to instruments. We know that the art of printing has done away with this argument. Not only are all official and most individual deeds, with seals appended, printed previously and filled up at the time of their execution, but even merchants and business men are adopting the same practice as it respects their notes. Once the seal was everything and the signature was nothing. Now the very reverse is true—the signature is everything and the seal is nothing.

Thanks to the advancing intelligence of the age. In the days of ignorance, to be able to read and write would save a felon's neck. Many of the educated gentry now who are too lazy to work and prefer to live by their wits are the fellows upon whom the penalties of the law are visited in their utmost severity. So long as seals distinguished iden-

tity, there was propriety in preserving them. As a striking illustration, see the signatures and seals to the death warrant of Charles the First, as late as January, 1648. They are 49 in number, and no two of them are alike. But to recognize the waving, oval circumflex of a pen, with those mystic letters to the uninitiated, L. S. imprisoned in its serpentine folds, as equipotent with the coats of arms taken from the devices engraven on the shields of knights and noblemen; shades of Eustace, Roger de Beaumont and Geoffrey Gifford, what a desecration! The reason of the usage has ceased; let the custom be dispensed with altogether. In Jones v. Logwood, 1 Washington's Rep., 56, President Pendleton states that there was a period when the impression was made with the eye-tooth, and thinks there was some utility in the custom, since the tooth's impression was the man's own and presented a test in case of forgery. But this reason, however applicable in Virginia in 1791, does not hold true in this epoch of dentistry, when no man's tooth is his own, but teeth, like almost everything else, are artificial. Another learned judge, adverting to this same fact, traces to it the phrase, "I will prove it to your teeth, or by your teeth." He also supposes that "the cutting of the eye-tooth" had an allusion to this, whether the eye-tooth being cut at a certain age, it might denote the being of the age of discretion, so as to be capable of contracting; or whether it related to the impression of that tooth as a mark, being a tooth of signal and singular impression. . . . For myself, I am free to confess that I despise all forms having no sense or substance in them. . . . I would cast away at once and forever all law not founded on some reason—natural, moral or political. I scorn to be a "cerf adscript" to things obsolete, or thoroughly

deserving to be so. And for the "gladsome lights of jurisprudence" I would sooner far go to the reports of Texas and Arkansas than to cross an ocean three thousand miles in width, and then travel up the stream of time for three or four centuries to the ponderous tome of Siderfin and Keble, Finch and Popham, to search for legal wisdom. The world is changed. That court and country is behind the age that stands still while all around is in motion. . . . I admit that many old things may be good things—as old wine, old wives, aye, and an old world, too. But the world is older and consequently wiser now than it ever was before. Our English ancestors lived comparatively in the adolescence, if not in the infancy, of the world.

It is true that Coke and Hale and Holt caught a glimpse of the latter-day glory, but died without the sight. The best and wisest men of their generation were unable to rise above the ignorance and superstition which pressed like a nightmare upon the intellect of nations. And yet we, who are "making lightning run messages, chemistry polish boots and steam deliver packages," are forever going back to the good old days of witchcraft and astrology to discover precedents for regulating the proceedings of courts, for upholding seals and all the tremendous doctrines consequent upon the distinction between sealed and unsealed papers, when seals *de facto* no longer exist! Let the judicial and legislative axe be laid to the root of the tree; cut it down; why cumbereth it, any longer, courts and contracts?

Chapter X.

ROMANCE IN LAW.

LAST, but potentially greatest, of the stressed ills in the dramatists' plaint—"the oppressor's wrong, the proud man's contumely, the pangs of despised love"—is "the law's delay," an ill strikingly portrayed by England's master of words: "This is the Court of Chancery, which has its decaying houses and blighted lands in every shire; which has its worn-out lunatic in every madhouse and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the rounds of every man's acquaintance; which gives to moneyed might the means abundantly of wearing out the right; which so exhausts patience, courage, hope; so overthrows the brain and breaks the heart, that there is not an honorable man among its practitioners who would not give—who does not often give—the warning, suffer any wrong that may be done you rather than enter here."

Comparable in some respects to the drama of Jarndyce and Jarndyce was Strathmore against Bowes, which was in the English Court of Chancery for twelve years, from 1785 to 1797.

The Countess of Strathmore became a widow by the death of the Earl in 1776. A beautiful, impulsive young heiress, possessed of divers castles and extensive lands, she lived with her servants and two small children on a solitary moor. In a year she yielded to the attention of a young nobleman named Grey and promised to become his wife. There was a fascinating, dashing Lieutenant Stoney—an unknown rival

of Grey and personally unknown to the countess till one fateful night. This unknown rival harbored uncompromisingly in his unscrupulous soul the theory, "all's fair in love and war." There suddenly began evil gossip against the character of the countess, and an editor printed an anonymous letter which defamed her name.

On a dark winter night (January, 1777), one week after her promise to wed Grey, a messenger summoned her to the bedside of a dying stranger—Lieutenant Stoney. Distracted and mortified by the false attacks on her character, the summons seemed to vaguely portend some relief, and she obeyed the call. At the lieutenant's home she was met by a surgeon who announced that Stoney had discovered her traducer, had engaged him in a duel, was mortally wounded, and could live but a few hours. The lieutenant, aided by the surgeon's artificial skill, had assumed the appearance and posture of one in extremis. In broken utterances he told the countess that in attempting to kill her traducer he had met his own doom. That, though glad to sacrifice his life to defend her character, it would brighten his drear departure and he would die supremely happy if she would become his wife. The countess was young, temperamental and impulsive. This man had lain down his life to relieve her shame and tortured spirit. She consented, a minister was brought, and they were married. The wounded groom at once began to improve, and in a week he entirely recovered. The countess, upon discovering that the duel was a fabrication and that the alleged lieutenant was a plain Mr. Bowes with no military experience or appendage and was himself her traducer, blandly informed him that one month before, in contemplation of her marriage to Grey and with Grey's knowledge and

consent, she had settled all her property to the use of herself and her two children, and held it independent of Bowes' common-law rights as her husband; in fact, that Bowes had drawn a blank. Her tricky spouse was so enraged that he threatened her life unless she revoked the deed of settlement, and through fear of death she yielded to the threat and annulled the deed. This monster then subjected the countess to most barbarous cruelties, and she was imprisoned in a remote castle on her own estate. After months of suffering she escaped and, calling to her aid able counsel, instituted an action to set aside the deed of revocation. The case was in the Courts of Chancery for twelve years, from 1785 to 1797, and was finally decided in her favor.

The equitable rule evolved from this remarkable state of facts is that where a woman pending a treaty of marriage settled all her property to her separate use with the knowledge and consent of her contemplated husband, but was subsequently induced through fraud to marry another, such deed is not void as to the man she married, but that a deed revoking the settlement, made under duress, is void and of no effect.

And so went "with yesterday's seven thousand years" this sad story of the fair countess when it passed as an issue for equitable determination. Her great-grandson and the great-grandson of Bowes was a member of the House of Lords and was the owner of famous race horses. The facts stated in this narrative were culled from 1 Vesey's Chancery Reports, 2 Cox's Chancery Reports, and 2 Brown's Chancery Reports.

EDWARD III

DURING WHOSE REIGN "BENEFIT OF CLERGY" WAS PARAMOUNT IN ENGLISH JURISPRUDENCE.

QUEEN ELIZABETH

DURING WHOSE REIGN "BENEFIT OF CLERGY" WAS PRACTICALLY DISCARDED.

Chapter XI.

"Benefit of Clergy."

When Education was an Incentive to Crime.

THIS may or may not suffice to explain the title to Kipling's tragic and pathetic story, "Without Benefit of Clergy." It may show or it may not show that the author missed connection between story and name. Pronouncement of a death sentence was once featured by drollery in a court of North Carolina. The trial judge had been but recently elevated to the bench, and it was the first trial over which he presided—an indictment for murder—the prisoner a very black and ignorant negro. There was a verdict of murder in the first degree; the jury were polled and the formal motions, to set aside the verdict, for a new trial on the ground of alleged errors in the course of the trial and motion in arrest of judgment, were overruled, and the prisoner was sentenced to suffer death on a certain Friday in August. Then the prosecuting attorney hastily moved to the bench and whispered to the judge, whereupon His Honor, with apparent disconcertion, announced to the prisoner that the court had erred in failing to give the prisoner opportunity to show why sentence of death should not be pronounced against him, and that he was then at liberty to avail himself of that opportunity. The prisoner's counsel explained to him the purport of this statement; he arose and with marked reticence said that he didn't "want to do nothin' wrong" or to "hurt nobody's feelin's," but if it wasn't "no harm" he would like to "ast gist one question." He was assured by the judge that he might ask any question or make any remarks he pleased. A minute of silence, and the terrified wretch hysterically

exclaimed, "Fer Gawd sake, boss, yer don't mean no Friday in this 'ere very next August, does yer? Yer means some other August, don't yer, boss?" It was gratifying that this pathetic drollery excited sympathy, which resulted in a commutation of sentence.

It is questionable whether the judge had committed reversible error, but he had certainly erred as to form. And why? And was it ever possible for such opportunity to avail in sparing a prisoner's life? Here is seen the last vestige of a plea which originated more than five hundred years ago, at a remote period antedating the reign of Edward III in 1237 —"Benefit of Clergy!" What was it and what was the cause of its origin?

Like "The Ivy Green," the law tenaciously clings to forms of dead substances—

> "The wall must be crumbled, the stone decayed,
> To pleasure his dainty whim;
> And the mouldering dust that years have made
> Is a merry meal for him."

Before 1868 North Carolina followed the impracticable doctrine of the common law concerning women. Upon her marriage a woman's existence merged into that of her husband—they became one person. But, quoting Chief Justice Bleckley in a Georgia decision, "A wife is now a wife, not a husband as she was formerly. Legislative chemistry has analyzed the conjugal unit, and it is no longer treated as an element, but as a compound." This analysis represented a long stride in North Carolina; not till 1806 had it been judicially determined or declared by legislative enactment in this State that women, married or unmarried, were entitled to even "benefit of clergy," although this "benefit" had been

accorded women more than one hundred years before in England, where the thing started.

It was solemnly declared in 1806, in the case of State v. Elizabeth Gray, 5 N. C. Reports, p. 147, "No reason can at this day exist why females shall not be entitled to benefit of clergy as well as males." One hundred and eighteen years ago, and then an interesting judicial pronouncement, but now just a dead precedent, apparently as devoid of interest as show bills of a play that's been played.

"Ancient European monarchs had much for which to atone and ambitions not always lofty, which must receive divine sanction," says Chitty. The clergy were regarded as "vice regents of Heaven," and in consideration of indulgencies to royal deviltry committed and contemplated, officers of the church were in some European countries granted immunity by the crown from all civil liability. In medieval times learning was confined almost exclusively to the church and the bar. The barons who signed Magna Carta at Runnymede could not write their names, but their acquiescence was attested by coats of arms and seals. Thus, there was a legal presumption that one not a lawyer or a clergyman, but who could read and write, was necessarily connected in some way with the clergy and, therefore, not amenable to the civil courts. One who desired to gratify criminal proclivities needed only to acquire a meagre education, commit a crime, and when brought before the civil courts for punishment plead "benefit of clergy," sustain the plea by proving educational attainments, and secure his release. So we have it that once in the history of the English race education was an incentive to crime. But the clergy also "had ambitions not always lofty," which, though propitiated, as was supposed,

by the divine dictum in conferring power to St. Peter, was ineffectual in earthly tribunals of the law. These not always lofty ambitions of the clergy might be attained by questionable agencies, and it was, therefore, sometimes necessary to secure immunity for henchmen of the clergy from the civil courts. So it is seen that "benefit of clergy" was primarily a benefit for clergy, though tacitly savoring of reciprocity—the crown saving the clergy from the courts and the clergy saving the crown from the devil. As the fallacious fraud in this compact could be revealed only by death, there was no recourse for the crown. In its inception "benefit of clergy" was merely a legal excuse to the clergy and all its official connections from trial in the civil courts for the commission of crime and confining supervision of their conduct to the ecclesiastical courts, where convictions rarely resulted.

In England complete exemption of the clergy from secular punishment was never universally conceded, but the benefit was liberally applied: from first being granted to every order of clergyman and subordinate officer of the church, it was finally, in the reign of Edward III, granted to every one who, upon trial of a felony, was able to read; ability to read, as has been shown, carrying the presumption that one so accomplished was connected in some way with the clergy. But during the reign of Henry VII (1485) a distinction was made between ecclesiastical and secular clerks, secular clerks being allowed to plead benefit of clergy only once, and then branded in the hand to identify them on subsequent indictments. This mutual aid agreement between church and crown did not subserve the rough and ready methods of "Bluff King Hal" in quitting and acquiring wives. One may readily surmise its appalling effect on the serene celibacy of

His Tranquil Holiness, the Pope. He refused to recognize Henry's marriage with Anne Boleyn, but Parliament, in 1534, put aside the Pope's authority in England, and in 1535 declared Henry VIII the supreme head of the church. But even at that late day the effect of "benefit of clergy," though not as formerly a serious menace to the jurisdiction of the civil courts, was a festering sore on English jurisprudence. It remained for the Protestant Queen—whimsical, discerning old "Bess"—to take the forward step; she entirely excluded all heinous crimes from "benefit of clergy," and it was enacted that on conviction in cases in which the "benefit" could be pleaded, the prisoner should be branded in the hand and then released. In later times, by various enactments, "benefit of clergy" was abolished, but its mere name was retained as designating a plea for commutation of sentence to a milder punishment than that prescribed by the law, and it was granted without regard to the prisoner's connection with the church or his educational acquirements. If a statute which imposed death as a penalty did not conclude "without benefit of clergy," it meant that the prisoner might plead "benefit of clergy" and secure a more endurable penalty than death—perhaps; for the minimum punishments were branding in the hand or on the cheek with a red-hot iron, a public whipping on the bare back, the surrender of one or more ears, or, happily, just transient residence in a barbarous English jail. When "benefit of clergy" was at its worst in England, and those who could read or write escaped punishment in the civil courts, this sham gave no protection to women. Women might be educated, it is true, but as there were no women clergymen or lawyers in those times, their educational attainments did not carry the presumption that they were

clergymen or even connected officially with the church. The exclusion of women from clerical benefits ceased in England as early as the reign of William and Mary, but North Carolina was not aroused to a similar regard for female criminals until more than one hundred years after England took the step.

Old American statutes, enacted at a time when there was such a variety of exquisite tortures by which a culprit might be penalized without taking his life, vested in the sound and more or less humane discretion of the trial judge the power of selection—the prisoner must pay the penalty and the judge must take his choice; choose almost any penalty short of death, even though the statute prescribed the death penalty, but did not conclude "without benefit of clergy." But if the law was dead earnest about death, it did not merely prescribe "shall suffer death," but "shall suffer death without benefit of clergy."

Recurring to chapter 11, Public Laws of North Carolina for 1790, which provides that "one guilty of bigamy shall suffer death," but not concluding "without benefit of clergy," one wonders just what manner of punishment short of death was meted out to duplex spouses of the long ago.

The Revised Statutes of North Carolina, chapter 34, section 26, provides that a prisoner who has been allowed "benefit of clergy on conviction of manslaughter shall be branded with an M on the brawn of the right thumb, and one convicted of any other felony shall be branded with a T in the same place on the left thumb, these marks to be made by the sheriff openly in court." Judgments inflicting this penalty, which I have seen, provided that the hot branding iron shall be held on the prisoner's thumb until he three

times utters "God, save the State!" When this punishment was once being inflicted in the Superior Court of Wake County, the prisoner's third utterance was "God, d—n the State!" and the presiding judge had the sheriff reheat the iron and again apply it to the prisoner's thumb until the utterance was made devoutly three times as directed.

Benefit of clergy was abolished in North Carolina in 1854, and seems to have been abolished in all the other States wherein it ever existed. The time of its usage as a plea to the jurisdiction of the English civil courts and as a plea in the American courts to arrest the death sentence covers a period of about six hundred years.

But, to return to the negro who so earnestly craved explicit information concerning the schedule of his final departure. Why do courts observe the farce of permitting an appearance in *propria persona* by a prisoner who has been found guilty of murder after his counsel have exhausted in his behalf every legal remedy then available? Is this not a vestige of ancient English jurisprudence which served so long to cloak rascality and crime? The old plea of "benefit of clergy" was made by the clerk directing the prisoner after conviction to stand and say "why sentence of death should not be pronounced upon him, and the prisoner then fell on his knees and prayed the 'benefit.'" The prisoner might have given a reason then; he can give none now.

Yes, like "The Ivy Green," the law most tenaciously clings to forms of dead substances—

> "How closely he twineth, how tight he clings
> To the trunk of the dead oak tree;
> And slyly he traileth along the ground,
> And his leaves he gently waves
> As he joyously hugs and crawleth around
> The mould of dead men's graves."

Chapter XII.

LIBEL.

DID JEFFERSON PAY CALLENDER TO LIBEL WASHINGTON? THE EMANCIPATION OF THE PRESS.

THE freedom of the American press was the result of an indictment for personally libeling the President of the United States. This has not attracted the attention of historians, but the fact is established by judicial annals. It may be reasonably assumed that Harry Croswell of Hudson, New York, was the first and only offender brought to the bar of justice of any State of the American Union for personally defaming the President of the United States, and that subsequent unbridling of the public tongue caused speedy realization of the inadequacy of our judicial machinery to further control public invective.

Democracy demands paramount, but encourages grudging allegiance to a government by the people.

Though tinctured by scurrility and abuse, there was an ingredient of rare ludicrousness in the embryology of the American press. The pamphletical tantrums of our infant republic, which no reputable paper of its adult age would permit, were mollified by advice to bachelors and spinsters, discourses on science, theology, agriculture and philosophical reflections, and (according to Ridpath) "there was a playground for the Muses, who disported themselves after the lumbering fashion of the eighteenth century."

The year 1797 was famous for public scandals, rancorousness of the press, and violent bitterness of party spirit. Ben-

jamin F. Bache, editor of the "Aurora" and grandson of Benjamin Franklin, charged that Washington's administration had "countenanced political iniquity and legalized corruption." And concerning the administrations of Washington and John Adams (although himself Vice-President during Adams' administration), even Jefferson wrote, in the famous Mazzeni letter: "In place of that noble tone of liberty and republican government which carried us triumphantly through the war, an Anglican, monarchical, aristocratical party has sprung up whose avowed object is to draw over to us the substance, as they have already done the forms of the British government. . . . Against us are the executive, the judiciary, all the officers of the government, all who want to be officers, all the timid men who prefer the calm of despotism to the boisterous sea of liberty; British merchants, speculators and holders in the banks and public funds—a contrivance invented for the purpose of corruption and for assimilating us in all things to the rotten as well as to the sound parts of the British model. It would give you a fever were I to name the apostates who have gone over to these heresies; men who were Samsons in the field and Solomons in the council, but who have their heads shorn by the harlot of England. In short, we are likely to preserve the liberty we have obtained only by unremitting labors and perils."

In many of the States there was evinced this same spirit of truant children determined to work out their own salvation, but who were fearful lest some of their juvenile brethren were homesick, timid and doubtful that it were wise to continue the venture. History shows that there was reasonable cause for this fear.

WHEN LAW-MAKING WAS FIRST MADE TO SUBSERVE PARTY PLANS.

The Federalist party in seeking to make legislation subserve party plans synthesized personal libel and sedition by enacting the sedition law in 1798. It was perfectly apparent and it was publicly declared that the object of this law was not to prevent or punish sedition, but to protect principles of the Federalist party. The sedition bill, as introduced, declared in effect that France being an enemy of the United States, adherence to Frenchmen and giving them aid and comfort were "offences punishable with death." As amended and passed (but to expire with the succeeding Congress), it provided that it was a high misdemeanor to "unlawfully combine or conspire with intent to oppose any measures of the government of the United States, direct or by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding office from enacting his trust, or to commit, advise or attempt to procure any insurrection, riot or unlawful assembly." The penalties were a fine not to exceed $5,000 and imprisonment from five to six years. The other provisions of the law constituted the political gag; the law also imposed a fine of not more than $2,000 and imprisonment not to exceed two years for "any false, scandalous or malicious writing against the government, either house of Congress or the President, with intent to defame them, to bring them into disrepute," etc.

History records seven indictments and five convictions under the sedition law. The first was Matthew Lyon, a lusty Irishman and Vermont editor. He was indicted, convicted, and fined $1,000 and imprisoned four months for publishing

the following comment upon the administration of John Adams: "Every consideration of the public welfare was swallowed up in a continued grasp for power, an unbounded thirst for ridiculous pomp; men of merit were put out of office for independency of sentiment, while men of mean abilities were put in because they would vote as they were directed. The sacred name of religion was made a state engine to make mankind persecute and hate each other." Also that Washington had forced Jay's treaty upon the people "by an influence which contrasted strangely with the known weakness of Washington's political talents."

Charles Holt, of the "New London Bee," and Anthony Haswell, of the Vermont "Gazette," were also indicted and convicted under the sedition law, and each fined $200.

Thomas Frothingham was indicted for asserting that Hamilton had endeavored to buy "The Aurora" (Bache's paper) and thus stop its attacks upon the Federalists. It is not known by the writer that he was convicted.

Thomas Cooper was indicted for having declared that in 1797 President John Adams was "only in the infancy of his political mistakes and had not then signed the alien and sedition laws or abolished trial by jury." This tartness caused him to forfeit $400 and personal freedom for six months.

William Duane was indicted for having charged that during John Adams' administration there was a party in America open to British influence, but the indictment was *nol. prossed* when it became known that Duane possessed a letter written by President Adams which contained similar charges.

James Thompson Callender, said to be "the most thor-

oughly despicable and unscrupulous editor then in America," was indicted for publishing that Washington was "a traitor, a robber and a perjurer," and that John Adams was "a hoary-headed incendiary." This most defamatory libeler and the only blackguard of the lot was fined $200 and imprisoned for six months.

THE FIRST INDICTMENT FOR PERSONAL LIBEL OF THE PRESIDENT.

The foregoing were all federal indictments for violations of the sedition law. Perhaps there were others of minor purport but these only have attracted historical comment. In 1803 Harry Croswell of Hudson, N. Y., editor of "The Wasp" (all publications seemed to specialize in stinging propensities in those times) was indicted under the common law at the "general sessions of the peace" of Columbia County, New York, for publishing that Thomas Jefferson, then President of the United States, "paid Callender to call Washington 'a traitor, a robber and a perjurer.'" This old case, obliterated by time and numberless precedents of a later day, resulted in the real forward step in the emancipation of the American press. The specific charge in the indictment was that Jefferson "paid or caused to be paid to said Callender, two several sums of $50 each, one of which was prior to the publication . . . and the other subsequent to the publication thereof, as a reward, thereby showing his approbation thereof." Upon the trial in the circuit court of Columbia, Croswell moved for time to procure evidence of the truth of the publication, but this was denied, the court holding that the truth of the publication was not admissible in evidence. From this and other ruilngs the defendant

appealed to the Supreme Court of Judicature of New York. When the case came on for hearing in that court one of the justices did not sit, having been prosecutor in the circuit court and subsequently appointed to fill a vacancy in the Supreme Court; the other four members of the court were equally divided in their opinions, two of the justices holding that on trial of a common law indictment for libel, evidence to prove the truth of the libel was admissible and the other two holding that such evidence was inadmissible. Croswell was represented by Alexander Hamilton and this was one of the last cases argued by Hamilton before the Supreme Court. He was killed in July, 1804, and this case was argued in February of the same year.

After Croswell's case had gone off by a divided court in February, 1804, on the questions of admissibility of the truth of a libel and whether on trial of an indictment for libel the jury were judges of both law and fact, the Legislature of New York in April of the same year enacted that "In every prosecution for writing or publishing any libel, it shall be lawful for the defendant upon the trial of the cause to give in evidence in his defense the truth of the matter contained in the publication charged as libelous: *Provided always,* that such evidence shall not be a justification, unless on the trial it shall be further made satisfactorily to appear that the matter charged as libelous was published with good motives and justifiable ends."

On page 413 of the third volume of "Johnson's Cases" is the following notation concerning Croswell's case: "In consequence of this declaratory statute the court, at August Term, 1805, (no motion having been made for judgment on the verdict) unanimously awarded a new trial."

After diligent research in the New York law reports and inquiries directed to Hudson, N. Y., it has been impossible to ascertain the ultimate determination of this celebrated case. Perhaps, like many other old cases—momentarily the vortex of public and political furor—it sank into oblivion when the calm followed the storm. It deserves attention however as the precursor of the great privileges first accorded the American press.

LIBEL.

The spirit of the law against libel was anciently and perhaps is now to protect the individual from public defamation and ridicule and to protect the government from breaches of the peace by preventing incentives thereto. The common law of England severely discountenanced scandal mongers and libelers and the laws of the Anglo-Saxons penalized them by cutting out their tongues. Under the 12 tables of the Roman law the penalty was death. And these were not solely for offences against the government, but for offences against individuals as well. The conflicting opinions of the justices of the State Supreme Court of New York in the Croswell case respecting the question whether the common law permitted the truth of a libel to be admitted in evidence, presents authorities in support of both contentions.

Blackstone (4 vol. 151) said, "A libel is punishable, not because it is false, but because of its evil tendency; its tendency to a breach of the peace." Another authority is that "The malicious publication of the truth will often affect to a most pernicious degree the harmony and happiness of society. A libel is the more libelous for being true, for it has an increased tendency to a breach of the peace. In a

moral view, the malicious relating of either truth or falsehood, for the purpose of creating misery, is equally reprehensible."

And criminal intent was no ingredient of the offense, "as no man shall be allowed to scatter arrows, firebrands and death, and say, 'am I not in sport?'"

On the other hand, it is shown that as a libel is a defamatory publication, made with a malicious intent, the truth or falsity of the charge is material in ascertaining the intent and in some cases it is competent for the defendant to rebut the presumption of malice by introducing evidence of the truth of the libel. To shut out wholly inquiry into the truth of a libel is to abridge essentially the means of defence. It is to weaken the defense and to convict the accused by means of a presumption which he might easily destroy by proof that the libel was true and that, considering its nature, the circumstances and time under which it was made, and the situation of the person implicated, his motive could be no other than a pure and disinterested regard for the public welfare.

It seems that New York was the first state to affirmatively declare by legislative enactment, instead of judicial construction of the common law, that one might publish a defamatory truth for justifiable ends, and that this legislation was the result of an indictment for libeling Thomas Jefferson.

JEFFERSON AND CALLENDER.

Rugged contours of great boulders do not deteriorate their strength. "Distance lends enchantment." Crevices are smoothed by the softening light of time or, on closer view,

are overshadowed by mighty projections. Jefferson's greatness has overshadowed his frailties and foibles of human nature—his tendency to acrimony and his propensity to pernicious activities. It has been said by one of his biographers that time could not allay his suspicion and jealousy of Washington and other of his compatriots, and that Jefferson was so innately affected by an implicit belief in the absolute rights of man as to almost justify the supposition that he actually believed man should not be governed at all. He certainly evinced the belief of Macon, that "government, like clothes, is a badge of fallen innocence." The inherent frailties and indiscretions of Jefferson are not more strikingly shown than by his intimacy with a man of Callender's type. The evident purpose of this intimacy is not consistent with true nobility, yet

> " . . . Men may rise on stepping-stones
> Of their dead selves to higher things."

In his letter of October 11, 1798, to Stephen Thompson Mason, Jefferson wrote: "I received lately a letter from Mr. Callender to which the enclosed is an answer. After perusing it, be so good as to stick a wafer on it and deliver it. You will see that I propose to you the trouble of drawing for 50 D. for Mr. Callender on my correspondent in Richmond, George Jefferson, merchant. This is to keep his name out of sight. Make your draught if you please in some such form as this, 'Pay to..... or order (or send me in bank bills by post) 50 dollars on account of Thomas Jefferson according to advice received from him, &c.' I shall immediately direct him to pay such a draught from you, without mentioning to him the purpose." ("Jefferson-Writ-

ings," by Ford, vol. 7, p. 282). This certainly shows a scheme to clandestinely aid Callender.

In an undated letter to Callender which was perhaps the one enclosed in the letter to Mason, and in which Jefferson refers to himself in the third person, he wrote: "Mr. Jefferson happens to be here and directs his agent to call on you with this and pay you 50 dollars on account of the book you are about to publish. When it is out be so good as to send me 2 or 3 copies and the rest only when I shall ask for them. The violence which was meditated against you lately has excited a very general indignation in this part of the country." And the letter concludes, "With every wish for your welfare, I am with great regard, sir, your most obedient serv't." (Ibid. vol. 7, p. 392).

In another letter to Callender from Monticello, dated October 6, 1799, Mr. Jefferson writes: "You will know from whom this comes without a signature: the omission of which has been rendered almost habitual with me by the curiosity of the post offices. Indeed a period is now approaching during which I shall discontinue writing letters as much as possible, knowing that every snare will be used to get hold of what may be perverted in the eyes of the public." (Ibid. vol. 7, p. 393).

But concerning Callender Jefferson protested as follows in a letter to James Monroe, written at Monticello, May 29, 1801, after Callender's trial for libeling Washington: "Since mine of 26 Callender is arrived here. He did not call on me, but understanding that he was in distress I sent Captain Lewis to him with 50 D. to inform him that we were making some inquiries as to his fine which would take a little time, and lest he should suffer in the meantime, I had sent

him &c. His language to Captain Lewis was very high toned. He intimated that he was in the possession of things which he could and would make use of in a certain case; that he received the 50 D. not as charity but as a due, in fact as hush money; that I knew what he expected, viz.: a certain office, and more to this effect. Such a misconception of my charities puts an end to them forever. You will therefore be so good as to make no use of the order I enclosed to you. He knows nothing of me which I am not willing to declare to the world myself." (Ibid. vol. 8, p. 61).

And again in 1802 he writes to Monroe, referring to a former letter, "I enclose you a paper which shows the Tories mean to pervert these charities to Callender as much as they can. They will probably first represent me as the patron and support of 'The Prospect Before Us' and other things of Callender's, and then picking out all the scurrilities of the author against General Washington, Mr. Adams and others and impute them to me." (Ibid. vol. 8, pp. 164-167).

The old case of People v. Croswell shows how accurately Mr. Jefferson surmised. Yet Jefferson was truly great. Callender was despicable, dirty and mean!

Chapter XIII.

Most astounding impression ever made on Supreme Court of North Carolina.

(Old Yesterdays in Court.)

"EITHER you have a devil of a memory or you are a great deal older than I thought you were," said my good friend Charles Whedbee. "How old were you when Chief Justice Pearson and Judge Reade were admitted to the bar?"

But memory, Charles, is like fortune and a fice dog—pursue him or her and either will flee; seek to avoid them and they will follow and will cleave to you. Perhaps the fice is the more accurate comparison, for I know that it is not ever thus with Dame Fortune. But anyway, isn't memory just a subaltern exercise of mental activity and nothing to really brag of? The hog has an excellent memory, likewise all animals. The exercise of this faculty by beasts is even scriptually axiomatic—"The ox knoweth" (or remembereth) "his owner and the ass his master's crib," saith the prophet. Perhaps some one will say, "Yes, but memory with beasts is merely instinct or at least the faculty which the life of a beast brings constantly in demand." Well, how much more is it an instinct with man and how much less is this faculty brought into demand by the life of man? Suppose a man's memory is utterly destroyed, how can he function as a human entity?

Every impression on the human mind is everlasting—as indelible as tombstone inscriptions; we never really forget anything, though sometimes we cannot readily recall things. They are there but we cannot for the moment find them. That's because we haven't established an efficient mental

filing system. We stuff, pellmell, facts and events in our minds like a man packing his trunk or suit case and then when we hurriedly try to find some article or recall some fact or event we can't get it through we are positive we have it. If we take time for orderly arrangement there is little or no trouble in finding what we wish. When we come to the hair-brush in our orderly packed trunk or suit case, we know that the comb is near by, that our shaving brush, razor and perhaps manicure set are all in one case. So, accurate and ready memory is only the result or effect of orderly mental arrangement and hence correct mental association.

I am positive that equitable relief by Writ of Assistance, if ever before administered in North Carolina, the fact has been recorded only once in the records of the Supreme Court in at least 60 years, and though now seated fourteen miles distant from the archives of the Supreme Court, I would risk my life on the assertion that this writ of assistance was issued in the case of Knight vs. Houghtalling at the February term, 1886, of the Supreme Court and is recorded on page 34 of the minute docket for the term, and I affirm that I haven't referred directly or indirectly to this book for the last twenty years. "Extraordinary!" you may say. Not at all. It does not strain the imagination and perhaps does the law no violence to suppose that a guest at a swell social function, just before merging into the incipient stages of cumulative intoxication, receives a twenty-dollar bill and thinks no more of the money or the occurrence, and the next morning, having rung for ice water, immediately upon hearing the tantalizing tingle of the ice in the pitcher as the bellboy approaches, the occurrence of the night before looms in his mind because he wonders whether he has a quarter

for the boy. He arouses one of his companions, borrows a quarter, tips the bellboy, drinks the entire pitcher of water, and immediately begins to hunt for his dress-suit (even though he may have it on), feels in the vest pocket, and there's the twenty-dollar bill. If it hadn't been for ice or the bellboy the man with the money might never have remembered that he was twenty dollars "to the good." But when he heard the ice jingling he immediately remembered that he got twenty dollars the night before and, though he didn't remember where he put the money, his hand went instinctively to his vest pocket without the least mental activity.

I am positive that this Writ of Assistance in Knight v. Houghtalling, which issued from the Supreme Court in 1886, as far as Colonel Kenan and Justice Merrimon could ascertain, had never before been issued by the Supreme Court, and that it is recorded on page 34 of the minute docket for February term, 1886, because I copied it there and constantly referred to it because Colonel Kenan had so highly complimented my chirography.

Again, I know that the writ was issued in Knight v. Houghtalling, because that case is responsible for the most astounding impression that any one has ever made on the Supreme Court of North Carolina, and that impression was made by a boy in short breeches, and I am that boy! Could such a distinction ever escape the sane memory of the individual who caused it? I cannot doubt that this event was as glaringly inscribed on the memory pages of every man who was then a member of that august tribunal, as were pokeberry headlines on the pages of the *News and Observer* during "fusion days." I somehow feel that for many years preceding their departure from this life I was ever "at home"

to the minds of three illustrious jurists of North Carolina. Yea, I glory in the minds of William N. H. Smith, Thomas S. Ashe and Augustus S. Merrimon; I take particular and instinctive pride in these great minds, for I have not the vestige of a doubt that amazing thoughts of me are safely, securely and eternally garnered there—all on account of Knight v. Houghtalling. Justice Merrimon was the only member of the Court who was amused as well as greatly astonished, but Justice Ashe looked severely at me, and inquired with a voice evincing a kind of soul's bitterness, "Mr. Marshal, who is that boy and what is he supposed to do here?"

I afterwards learned to love Judge Ashe, and went a long way to attend his funeral. He was a great man, a kind-hearted man, a lovable man, and a great lawyer; his opinion in State v. Gooch and Smith, the first opinion of the Supreme Court of North Carolina ever transcribed on a typewriter (the work was done by me), is regarded as one of the most lucid expositions of the law respecting homicide, as it then obtained in this State, that has ever been delivered by the Supreme Court. It is reported in the 94th volume of the Supreme Court Reports, page—no, I have forgotten the page, but that's immaterial; look in the index and read from the original volume, not the annotated edition. Yes, Judge Ashe was a tender, kind-hearted, lovable man. He was one of the best men I ever knew and indulged in the meanest, most abominable, handwriting I have ever tried to read. But Judge Ashe was a nervous man, and I had greatly astounded him. Recalling the event after all these years, somehow I can't blame him for the way he looked at me and the bitter, biting tone of his voice. He had the appearance of a

man who was almost completely flabbergasted, and his voice was like a low growl—"Who is that boy, and what is he supposed to do here?"

I really didn't know what I was supposed to do; it was my first day with the Supreme Court, May 5, 1885—a beautiful, hot day, fine for fishing. Major William H. Bagley, the clerk, had employed me; he died during the early days of the following March. I was a hang-over of Colonel Walter Clark, who had just been appointed Superior Court judge by Governor Scales under the act of 1885 creating two additional judicial districts. Judge Henry G. Connor was the other appointee. At that remote period there was not a typewriter used by the State of North Carolina and only two lawyers in Raleigh, Colonel John W. Hinsdale and Colonel Walter Clark, used a typewriter in their offices. Chief Justice Clark was wont to tell me that I was the first modern law clerk in Raleigh. But he never said anything but just "the first"; he always stopped there, and I suppose he had his reasons, though he never disclosed them. Major Bagley—a most lovable man and fond of boys—was very much impressed when I filed with him a typewritten brief prepared by Colonel Clark. I distinctly remember the message I conveyed and the reply: "Ask Major Bagley if this typewritten brief won't answer for a printed brief." And the reply, "Yes, son, if you file fifteen copies. The rule says fifteen copies of a printed brief, and this is certainly printed." I was startled. That was before the day of carbon copies. What! Write that darn thing fifteen times? But Colonel Clark was considerate and had the brief printed.

Well, anyway, Major Bagley bought Colonel Clark's typewriter when the colonel became a judge and took the boy

along with the typewriter to operate it. I entered upon the performance of my duties during the absence of Major Bagley, the clerk, and arrived at my post on that fateful day half an hour before the door was unlocked. I waited around, whistling, till a negro man set two pails of drinking water before the door, and when he unlocked the door I boldly entered before him. The negro eyed me suspiciously and inquired who I was and what I wanted. I did not disclose my identity, but pertly replied that I had accepted a job there and would remain until Mr. Bradley came. I remained thirty-eight years. Bradley arrived in due course and immediately informed me that Major Bagley had gone to Oxford to sell some land under order of court in Knight v. Houghtalling, and would be back tomorrow. I learned years afterward that by act of 1887 final judgments ceased to be taken in the Supreme Court except in certain cases, and I have realized, when it was too late, that if this act had been passed in 1885, instead of 1887, the thing I am about to tell would never have happened, because Major Bagley would not have "gone to Oxford to sell some land under order of the court in Knight v. Houghtalling," and, being in his office, he would, of course, have protected me.

Bradley flung open the doors to one of the immense cupboard arrangements that entirely covered the four walls of the room and gathered an armful of manuscripts, flung them on the table, and said, "Here, count 'em and arrange 'em according to number." He scrutinized the result of my effort by the exercise of his ocular senses, first directly through the lens of his spectacles, then over the rim, and said, "Good!" And thus ended my first lesson.

I was ever observant, and even then, in a measure, dis-

cerning. I figured that Bradley had been a good soldier. This supposition has been since sustained. He was one of the heroes of Bethel, and was five feet from Wyatt when he was killed. My suspicion that he had military parts was aroused by his keenness for carrying out orders. "I'm clerk today. Major Bagley told me to say that he had gone to Oxford to sell some land under order of court in Knight v. Houghtalling. Be back tomorrow." I surmised he was keen on orders, because he said himself that Major Bagley had told him to say he had gone to Oxford to sell some land under order of court in Knight v. Houghtalling; be back tomorrow, and he kept saying it over and over, every time the door opened, without even looking up to see who had entered. I got the habit myself, and sometimes beat him to it, but couldn't say it as perfectly as Bradley, because I was honest and left out "Major Bagley told ME to say he had," and just said, "Gone to Oxford to sell some land under order of court in Knight v. Houghtalling; be back tomorrow." In this way I soon became thoroughly convinced respecting the whereabouts of Major Bagley, the cause of his absence, exactly what he was doing and when he would return.

Bradley directed me to stay in the clerk's office, and that if any one came in and inquired for him to call him, that he was expecting a man to bring him a game rooster. He said this as he made a break for the door, which opened into another room, and I heard a clock striking and the words "game rooster" just as the door closed. Then I heard some yelling as if the owner of the voice were trying to attract the attention of some one at a great distance, and I began to wonder where I was and what was going on in the next room. But I was very fond of game roosters, and

curiosity soon yielded to anticipation. I did not wait long. The outside door opened and shut without my hearing it, for I was looking through the window, and the door had an airbrake attachment, but, hearing a sound, I turned and began, "Major Bagley told Mr. Bradley to say—" but a deep voice said, "Where's Bob Bradley?" I beheld a lank, bushy-headed, bewhiskered denizen of the backwoods who had a large, beautiful fowl under his arm, holding him affectionately. I was lost in admiration. I chucked the rooster under the breast and he crowed twice. Again the inquiry, "Where's Bob Bradley?" Oh, yes, I was to "call" him. I chucked the rooster again, and again he crowed twice as I was right at the door leading into the mysterious room. The man and the rooster were right behind me, and none of us realized what we were walking into. As I started to push the door open, my hand being on the knob, and had opened the door a little bit, it was suddenly jerked wide open from the other side, and I was nearly pulled down, and the rooster crowed again, and I started to say in a boisterous way (because I was surprised and a little mad), "Mr. Bradley, here's your—" but I was face to face with him. Bradley had both his hands high in the air, flopping them downward toward me, but uttering no sound. I was surprised by his manner and looks. Had some one suddenly died? No, they were all alive and looking straight at me and the man with the rooster—three horrified old men on a rostrum and a dozen or more men standing on the lower floor. One man on the rostrum suddenly changed countenance and almost laughed. It was Judge Merrimon, as I afterwards learned when it was all over, and he patted me on the head. But the silence was

tense—awful! It was broken by, "Marshal, who is that boy, and what is he supposed to do here?"

So that's why I remember now, and always will remember, that on May 5, 1885, Major Bagley went "to Oxford to sell some land under order of court in Knight v. Houghtalling and said he would be back next day," and that he told Robert H. Bradley, late marshal of the Supreme Court, to tell where he had gone and when he would return.

Of course, my escapade was a sufficient knock-out, but, comparing the bustling present with that leisurely long ago, imagine then the effect of: "May it please the court, Mr. Barringer, speaking in Greensboro, has just authorized the clerk to announce to your honors that number 352 has been compromised by the parties to the suit and that the appellant desires permission to withdraw his appeal." Imagine how the court would stare and the Chief Justice would say: "The motion is allowed as a matter of course, but just where did the clerk say Mr. Barringer was when he spoke?"

No mountains of mail then; no scurrying of messenger boys or telephone wires rife with inquiries: "Are the assignments of error properly made in" so and so? "Does a motion lie under rule 29 before a case is before the court under rule 5?" "When does a motion under rule 17 prevail over a partial compliance with rule 5?" "What case is now being argued?" And so on *ad finem* till the portals to the judicial mill are closed and "the sound of the grinding is low." And even far into the night after the clerk is in the bosom of his family is he frequently deluged with the same inquiries.

No time for game roosters now!

Chapter XIV.

THE MAN WHO FIRST KINDLED A FIRE IN THE CAPITOL.

(Old Yesterdays in Court.)

REGARDING the premium on youth and the discount on age, chilled by fear of gray years in the future, the average white man with unattained aspirations is not inclined to ostentate an age past forty years. With the negro it is different. A negro has greater deference for impliedly rare knowledge acquired by time and experience than for knowledge acquired from books. To him every old person, especially if unlettered and of his own race, is necessarily a seer and more or less a "conjurer"—understands all mysteries and is highly and fearfully regarded. The negro defends a plain absurdity with, "Well, ennyhow, dat's whut old folks says," and reiterates that stubborn faith in meter and song—

" 'Tain gwine rain no mo',
En dat I shorely know;
Yit how in hell
Kin old folks tell
When 'tain gwine rain no mo'?"

I was well acquainted with Jerry Hinton, a former slave of Major Charles Hinton, who was once treasurer of the State. Jerry was the first man who kindled a fire in the Capitol Building, and, according to his master's family records and other authentic evidence, he lived 108 years, and, of course, bragged about his age. Its effect upon those of his own race was talismanic, and more than a century's association with the elite of the old South and its progeny assured him respectful regard by the white race. He was at once the

idol and gentle tyrant of small white boys. He was the only ante-bellum negro I ever knew within a wide acquaintance who totally abstained from the use of ardent spirits. Whether this was a custom of his early manhood I know not. Certainly he must have been addicted to worse vices. Once while watching a game of cards between kinsmen of his old master and anon dilating on the escapades of "Marse Charles" and himself, one of the white boys inquired, with a wink at the others:

"Uncle Jerry, did you and Cousin Charles ever play seven up?"

With disdainful asperity he replied, "God-a-mity, chile, Marse Charles could play ten up!"

Jerry's life ceased as the ticking of a run-down clock, with mental faculties as accurate as the hands which note the last hour. As party to a suit, I had him summoned to prove something which occurred in 1835 and which was very material to my interest. He was then 105 years old and totally blind. His testimony was so conclusive and his manner so impressive that he was promptly stood aside by opposing counsel.

Not many years ago an argument, fervent and eloquent, and distinguished by the fire and vigor of young manhood, was made before the Supreme Court by a lawyer who was eighty years old. He won his case, and I was told that he received a fee of one thousand dollars. Had this lawyer been recommended to a stranger seeking an advocate in the lawyer's home town, how hardly would the stranger, without seeing this lawyer, have employed him after learning that he was eighty years old! But we must either die or become old (a severe alternative), old at least in years, for 'tis said that

the years don't count unless we regretfully count the years, and that old age is only a disease, not necessarily caused by the flight of time. Anyway, in support of a personal disclaimer of old age, one's age shouldn't be reckoned solely by his aptitude to relate occurrences of long ago. He may have begun to remember things very early in life, or he may have developed an abnormal memory in infancy. These are merely habit or phenomenon—probable and possible.

COURT CONVIVIALITY AND OLD TYPES OF THE BAR.

How time circumscribes familiar places during years of absence! How much smaller seem the rooms where one learned to romp and play! How much narrower seems the old back yard where he played ball and "prisoner's base"! Over thirty-six years ago how spacious to a boy in knickers were the old Supreme Court room and the clerk's office in the Capitol, and to him now how small they seem, and, oh, how changed!

There are perhaps living in Raleigh today five lawyers who practiced there thirty-five years ago, and just three of that number are now engaged in the practice. But from elsewhere in the State there still regularly attend many who were identified with halcyon old yesterdays. As has been said, the old clerk's office in the Capitol was the out-of-town lawyers' loafing place, and there they gathered and remained sometimes the entire afternoon, especially in winter. The room has been made sacred by memories of many who gathered there—the inimitable, but matchless, imitator, Cy Watson. Who except Vance could tell a better story than Cy Watson? And there seemed to be always a well-balanced ration of conver-

sation, highly spiced with wit and mirth. Living constantly in the only sphere where life is truly dramatized, the lawyer gets the clearest insight into human nature with all its foibles, weaknesses and vices, and is best equipped for interesting discourses. There also come most readily to mind Colonel James Morehead, R. Z. Linney, Colonel R. F. Armfield, then Lieutenant-Governor and afterwards Superior Court judge; Colonel R. F. Hoke, father of Chief Justice Hoke (how he used to boast to Colonel Kenan, then clerk, of "Alex"!); Colonel Ham C. Jones, David A. Covington, George F. Bason, Charles Price; T. F. Davidson, then Attorney-General; and, seemingly out of tune with conviviality, the reserved, sombre, and sometimes forbidding G. N. Folk, of Caldwell, then a sparely built, stooped old man, but with coal-black hair and black, piercing eyes. He was regarded as a great lawyer and a masterful advocate. He attracted my boyish fascination as I watched him in the firelight, just before the gas was lighted, walking to and fro with his hands clasped behind, uttering no word except when addressed. And during the call of appeals at the end of the docket, the eastern, central, and western practitioners would all meet, and there would come Charles M. Stedman, Dr. John Manning, William A. Guthrie, ex-Judge R. T. Bennett, William H. Day, Charles M. Cooke, Thomas N. Hill, Robert O. Burton, John A. Barringer, Swift Galloway, Charles F. Warren, John L. Bridgers, Major L. C. Latham, and members of the Raleigh bar—Daniel G. Fowle, Joseph B. Batchelor, George V. Strong, John Gatling, Logan Harris, A. M. Lewis, Armistead Jones, Samuel F. Mordecai, George H. Snow, Ed Chambers Smith, the Haywoods, the Busbees, John Devereux and others—a brilliant and more or less con-

genial and gladsome throng long since dispersed "like leaves in wintry weather."

> "And so quietly have they passed away!
> Faintly it seems but yesterday."

W. N. H. Smith, chief justice, and Thomas S. Ashe and Augustus S. Merrimon, associate justices, then constituted the Supreme Court, this being prior to the Constitutional Amendment adopted in 1888, which increased the number of justices to five. The justices sometimes relieved the tedium of a long conference by mingling with the lawyers in the clerk's office. Judge Merrimon had a keen relish for a good story and a joke, but I have reason to believe he was much given to serious thought. Robert H. Bradley, marshal and law librarian, a good man and, as an efficient law librarian, a great aid to the court, but with a tendency to complain of bodily ailments, was crouched by the fire in the clerk's office on a cold rainy day groaning from the effects of rheumatism. Judge Merrimon strolled in from the courtroom and, having stood silently for a moment observing the disconsolate figure, solemnly inquired:

"Bradley, why don't you prepare to die?"

"My God, judge, I ain't gointer die yet!"

"Well, I don't know about that; you look it."

The throng in the clerk's office had thinned to Bradley, two or three lawyers who were busily absorbed over papers, and Captain Bill Day, who in one of his calm, thoughtful moods, sat low in a chair, his thumbs in the armholes of his vest, legs crossed, and gazing at the fire. Captain Bill cannot be more accurately described than as heretofore—"personification of antitheses—fiery and courtly; high tempered and

tender; devout, profane, eloquent and cultured; sometimes harsh and violent, but generous as a prince; a great trial lawyer. His uncontrollable temper sometimes caused him to give forth astounding utterances, and he was absolutely indifferent to the occasion or the effect of his words upon others. Once while earnestly addressing the court his opponent kept shaking his head and murmuring loud enough to be heard by the eloquent captain, "Nothing in it; nothing in it." Captain Bill suddenly turned upon him with, "Yes, 'nothing in it,' but you mean that bald, empty old head of yours; you don't mean there's nothing in my argument."

Captain Bill had not risen or spoken as Judge Merrimon addressed Bradley, and the judge turned from Bradley to Day:

"Day, do you believe in the divinity of Christ and the authenticity of the Bible?"

Captain Bill did not raise his head nor unfix his gaze from the fire, but replied in a low and deliberate tone:

"Judge Merrimon, I believe every bit of it. I never went into battle without saying over and over, 'God, be merciful to me, a damned sinner.'"

"Well, no wonder," chuckled the judge, "you were frightened and hysterical then."

"Oh, yes, I was scared; scared as a fice with a bucket of shot at his tail; but I say it yet, frequently and fervently; I say it now," replied the religious and profane captain.

A JUVENILE COURT "SPEILER"—RECOLLECTION OF A CONFEDERATE CABINET OFFICER.

"Oh, yes, you can do it," urged Colonel Kenan, clerk of the court, "but don't say 'oh, yes!' like Bradley. It's 'yez.'

Just say, 'Oh, yez! Oh, yez! Oh, yez! The honorable the Supreme Court of North Carolina is now sitting for the dispatch of business. God, save the State and this honorable court!' Now try it."

And I piped, "Oh, yes, the honorable the——"

"Oh, no; that's not it! Say 'yez'—y-e-z; and say it three times. And don't whisper; yell like you were rabbit hunting. Now, go ahead; try again."

"Oh, yez! Oh, yez! Oh, yez! Oh, yez——"

"Hold on! Don't say it but three times."

"The honorable Supreme Court is now here and may God——"

"Oh, cut out the 'and' and the 'may.' Start over; you'll get it next time. Why, a smart boy like you should learn that in no time."

Thus was I coached and cajoled into acting as bailiff for the court to meet an emergency caused by the sudden illness of Marshal Bradley. I earnestly prayed that he would speedily recover, stay well forever, and live always. I never realized before how sadly I could miss him. Memorable day! Terrified boy! Personal pomposity and a stentorian voice are supposedly the only essentials for this brief, but solemn, proclamation, aided by three loud raps with the gavel. Of these I had only the gavel. I was small, shy and skinny; my weak voice was rendered more feeble by the terror of my conspicuous position, and a great proneness to stutter and stammer could be overcome only by fierce jesticulation. But with the gavel in hand inability to vociferate was automatically cured—I could speak if I banged the table, hence each word was punctuated by a violent pound with the instrument, which caused one nervous justice to glare and bar to

titter. I was at once conscious of the dissimilar effect of my performances upon the court and the bar, for as I madly pounded I continuously looked wildly from one to the other. I was resentful and deeply aggrieved when I detected Colonel Kenan peeping at me through the cracked door and shaking from suppressed laughter. So he had gotten me into this mess and was laughing at me! In the afternoon before leaving I told the colonel that I preferred to be jobless the rest of my life rather than again make a fool of myself before the Supreme Court.

"There, there, boy," said that tender, big-hearted man, "we'll have no more opening of court by you. I'll do it myself till Bradley comes back. Stay on with me; just carry in the records, stay in the courtroom, and find the law books."

Perhaps I will always remember Scott v. W. & W. Railroad Company, 96 N. C., 428. The argument of that case was the occasion of my first and only meeting with a Confederate Cabinet officer.

I was busy in the courtroom one morning before court met, arranging records to be used in the day's argument of cases, and was unaware that I was not alone till I heard a pleasing voice:

"Good morning, young gentleman. Will you please find a book for me?"

It was an elderly, small man with manner and countenance which caused my earliest realization that it is possible to at once thoroughly know a person without even knowing his name. Chief Justice Smith entered and gave the gentleman a most cordial and deferential greeting, addressing him by a name by ear failed to catch, and the stranger received the same respectful regard of every one who entered. He re-

mained with Colonel Kenan in the clerk's office till "Scott v. Railroad" was called. I inquired his name of Colonel Kenan and learned that he was George Davis, ex-Attorney-General of the Confederate States. "Now, be sure to listen to his argument," admonished the colonel, "even if you don't understand what he's talking about." And certainly I did not understand the subject-matter of his address; he argued a dry damage suit; but to listen I would have been compelled even without knowing who the speaker was. Many summers have since waxed and waned, but I retain a distinct mental picture of this great man, though I never saw him again. No word he then uttered can be recalled by me, but the same rare diction employed in an argument of dry legal propositions, supplemented by ornate eloquence, is recognized in his tribute to the memory of Jefferson Davis.

A TRIBUTE TO JEFFERSON DAVIS BY HIS ATTORNEY-GENERAL.

"No man ever lived upon whom the glare of public attention beat more fiercely. No man ever lived more sharply criticized, more unjustly slandered, more sternly censured, more strongly condemned, more bitterly hated, more wrongly maligned and thoroughly slandered by enemies, betrayed by false friends, carped at by ignorant fools; and yet no man ever lived who could more fearlessly 'leave the vindication of his fair fame to the next age and to men's charitable speeches.' Standing by his open grave, and in all human probability not far from my own, I declare to you that he was the most honest, the truest, gentlest, bravest, tenderest, manliest man I ever knew.

"My public life was long since over. My ambition went down with the banner of the Lost Cause, and, like it, never rose again. I have had abundant time in all these quiet years, and it has been my favorite occupation to review the occurrences of that time and retrospect over the history of that tremendous struggle; to remember with love and admiration the great men who bore their parts in its events. I have often thought what was it the Southern people had to be most proud of in all the proud things of their record. Not the achievements of our arms. No man is more proud of them than I; no man rejoices more in Manassas, Chancellorsville and Richmond; but all nations have had their victories. There is something far better; it is this: Through all the bitterness of that time, and throughout all the heat of that bitter contest, Jefferson Davis and Robert E. Lee never spoke a word, never wrote a line, that the whole neutral world did not accept as the very indisputable truth. You all remember that Mr. Davis did not send a message to Congress in which he portrayed the condition and causes of things that all the world did not know it to be true. You know, you old gray jackets, yes, you all remember that when General Lee, in his quiet, modest, reverent way, would telegraph to Mr. Davis at Richmond that God had mercifully blessed our arms, all the lying bulletins that flashed over a continent could not make the world believe that there had been a Federal victory. Aye, truth was the guiding star of both of them, and that is a grand thing to remember. Upon that my memory rests more proudly than all else. It is a monument better than marble, more durable than brass. Teach it to your children, that they may be proud to remember Jefferson Davis!"

Chapter XV.

Chief Justice Pearson Portrayed—Personal Recollections of Three Great Judges—A Ten-Cent Circus Gets a Majority of the Court—When Fun Featured Trials in Court.

OF the governmental departments of our State the judiciary alone gives opportunity for enduring power and fame. Certainly for a Supreme Court judge there is remembrance long and secure. Portrayal of his countenance is on the court room walls and enduringly preserved in the records and reports of the court are portrayal of his life and his enunciations of the law. His body perishes and returns to dust, his mind lives and directs the affairs of men. Sixty years after an enunciation by Chief Justice Ruffin, an eminent lawyer finding it adverse to a principle he was endeavoring to establish, argued so vigorously before the Supreme Court that the context showed an error in its publication in the reports that the original was produced. The original manuscript showed that there had been no misprint and the ancient construction of the law was sustained. Controlled by the principle that when ceases its reason the law should cease, the doctrine of *stare decisis* accords with justice and public policy.

Referring to his great predecessor, Chief Justice Clark said: "The hunter in the Indian jungle discovers by unmistakable signs where the king of the forest has passed. So the lawyer who turns the leaves of our court reports, when he comes upon the opinion of Chief Justice Ruffin, instantly perceives that a lion has been there."

Thirty-five years ago, in presenting to the court the portrait of Chief Justice Frederick Nash, Fabius H. Busbee said: "In the absence of any appropriation from the State, we are obliged to look to the liberality of relatives and friends to supply these speaking memorials of the men whose lives have adorned our history and whose labors have enriched our judicial annals. I trust that we may indulge the hope that eventually the vacant spaces will all be filled, and upon the legal contests of the years to come in this commodious hall, will look down the faces of Henderson and Gaston, of Toomer, Hall and Daniel, of Pearson, Battle and Manly, of Boyden and of the others who yet survive." Mr. Busbee's hope was realized ere the close of his own brilliant career. From the walls of an even more commodious hall there now "look down" the faces of 35 jurists most of "whose labors have enriched our judicial annals." And among these is the portrayed countenance of each member of the court to whom Mr. Busbee's utterances were addressed.

Following the custom which soon resulted from Mr. Busbee's suggestion, Frank I. Osborne presented to the court the portrait of Chief Justice Pearson on behalf of his family March 15, 1893. Judge Osborne's address was a gem of eloquence. He is thus meagerly quoted:

"What would this world be without its graves and its memories? 'Tis the voiceless only that speak forever. At the banquets of the Athenians and the Romans it was their custom to bring forth the images of their illustrious dead and to place them beside the living at the festal board that the virtues of the past should be remembered and posterity inspired to imitate them by this continual presence of the dead. It may be in obedience to such a custom that these portraits

now adorn our court room walls. Fortunate is the State which is thus warranted in recognizing its great, both living and dead.

"North Carolina has indeed produced great statesmen, like her Badger; orators, like her Miller; but their fame is unsubstantial and traditional, in that they left behind them but little written record of their greatness. She must depend for her intellectual eminence upon her great jurists her Ruffins and her Pearsons; and these two, the one by common consent her great expounder of equity, the other the grandest common-law lawyer of the land, have sustained her eminence not only among her sister states, but has carried it across the sea and firmly fixed it in the birthplace of English law. It is impossible to think of either of these great judges without thinking of his great rival. Pearson, fired by an honorable ambition that burned as fiercely in his heart as it ever burned in the heart of a Cæsar or a Napoleon, wrote to conquer distant thought. He wrote his decisions not for his own day nor for an age, but for all time; and when recollection of the Kirk war shall have passed away, when persecutors and persecuted are alike forgotten, men, in reading that splendid biography written by his own hand in the records of our court, will gladly admit that he was a great judge and an upright man."

RECOLLECTIONS OF THREE GREAT JUDGES.

In the galaxy of North Carolina's great judges are the three who were first known to me and who then constituted the court—Chief Justice W. N. H. Smith and Associate Justices Thomas S. Ashe and Augustus S. Merrimon.

W. N. H. Smith was appointed chief justice by Governor Vance in 1878 to succeed Chief Justice Pearson. He served as legislator, solicitor and as member of the Federal and Confederate Congresses and was of counsel for the defense in the memorable Holden impeachment. He was offered votes sufficient to elect him speaker of the House of Representatives in 1859 on condition that he would commit himself on the tariff issue, but he refused the offer as he preferred the office only with an open mind and uncommitted.

Thomas S. Ashe was elected Supreme Court justice in 1878. He served as legislator and solicitor, as representative and senator in the Confederate Congress, as representative in the Federal Congress and was candidate for governor in 1868.

Augustus S. Merrimon was appointed by Governor Jarvis Supreme Court justice in 1883 to succeed Thomas Ruffin, junior, who had resigned. He too served as legislator and had a momentous and thrilling career as solicitor and Superior Court judge prior to and just after the War Between the States; was of counsel for the prosecution in the Holden impeachment, candidate for governor and was United States senator.

But with scenes that are dearest memory nurtures trifling and amusing incidents more than famous events. As countenances of these illustrious statesmen and jurists make, within a more circumscribed and prosaic sphere, "remembrance wake with all her busy train," there comes with scenes of halcyon days recollection of a ten-cent circus which made two weeks itinerancy in Raleigh in October, 1886, and the persistent but futile attempts of Colonel Thomas S. Kenan, then clerk of the court, to persuade Chief Justice Smith to accompany him to this show. Justice Ashe was

first beguiled and straightway his efforts augmented those of the fun-loving colonel in successfully persuading Justice Merrimon to affiliate with the saw-dust fans. All three then mercilessly dogged the chief justice but they acknowledged defeat when I confidentially reported that the chief justice had testily remarked to me, "Kenan seems to have gone crazy over that circus and he has about demoralized Ashe and Merrimon. They bored and disgusted me during conference telling about three clowns imitating a rooster fight, crowing and bumping and spurring each other."

Court adjourned then at one o'clock. I returned from "dinner," as it was then called, at two o'clock and kept the clerk's office open during the absence of the clerk. Chief Justice Smith remained during the two hours' recess and spent most of that time in examining authorities cited by counsel during the day's argument of cases and scantily, as it seemed to me, sustained his innerman by partaking of half a pint of parched peanuts and a glass of limeade. This was his unvarying custom and my boyish imagination conceived the idea that the chief justice subsisted solely on peanuts and limeade. The tortured curiosity resultant of comparing this meager ration with the demands of my own omniverous appetite was relieved by the colored porter who exclaimed when I mentioned the matter to him, "God a'mighty boy der you think Jedge Smith lives on ground peas and soda water? He eats es much vittles es you but he doan eat it here, he eats it at home."

This great man personified gentleness and sweet affability. His mind was a store-house of knowledge and he was a charming conversationalist. He died November 14, 1889,

and was succeeded as Chief Justice by Augustus S. Merrimon, who died three years later on the same day of the same month.

"There are no times like the old times," said a doleful poet. Perhaps he thought so because the smelting pot of time destroys the dross of bygone unpleasantness and memory transmutes the remnant into gold. Or perhaps because

> "When youth—the dream—departs
> It takes something from our hearts
> And it never comes again."

But certainly it is true that the rush and bustle consequent to increased litigation has dispelled the pleasantry which sometimes illumined court trials of "the leisurely long ago."

The reputation of Thomas M. Argo of the Raleigh bar was not commensurate with his greatness as a criminal lawyer and his rare talent for wit, drollery and humor. It has been said that wit in its finest sense "is an essence of wisdom, playing like lightning in the atmosphere of humor; that humor and drollery are creative, sympathetic and broadly human." This is compatible with the fact that great wisdom may be devoid of wit and humor and that one possessed of humor and drollery may be almost dearth of wisdom.

While the following incidents are but absurdly ludicrous and are by no means standards of Mr. Argo's scintillations they were regarded by a boy as marvelous. He was once opposed by two able lawyers, one tall, jerky and angular and the other low and sparely built. "May it please the court," said Mr. Argo, "I have followed through the jungle of legal lore the numberless authorities cited by my dis-

tinguished opponents and in hunting for analogous reason in support of their contentions I have flushed a vast covey of monkeys." The tall opponent interposed with the remark, "I am sure, your honor, that a similar hunt by the court will not justify such a ridiculous remark. I have boldly penetrated 'the jungle' and have 'flushed' no monkeys." To which Argo replied, "The result of my brother's hunt is altogether reasonable—it is natural that his nimble tread should not startle a monkey and that his visage should not disquiet even a social function of monkeys." And when frequent interruptions by the sparely built opponent had caused Argo to reach the breaking point, he blandly remarked to that gentleman, "If you nibble at me again I'll bait a mouse trap and catch you."

The late Major A. M. Lewis, who to the older members of the Raleigh bar is more than a fading memory, was terrific in his cross examinations and would emphasize a supposed triumph over a witness by rising, turning to the jury and throwing out his arms, extending his head and opening his mouth very wide. After concluding a rough handling of one of Mr. Argo's witnesses by this pantomime, Mr. Argo, before beginning his redirect examination, remarked to the jury, "Well, gentlemen, I congratulate you and the witness on a respite from observing the gyrations of the old cock bullbat, who can open his mouth one time and take in an acre of gnats."

When he was Superior Court judge, Chief Justice Clark, in announcing his ruling on a question of law argued before him by Mr. Argo on the preceding day, intimated that severely disparaging remarks made by Argo had reached the ears of the court. Argo quickly arose after the judge had

concluded and without the least show of disconcertion, exclaimed with mocked penitence, "I regret exceedingly your honor's intimation that I have been even remotely disrespectful to this court. I assure your honor that I have at no time made any remark to your honor's face that I would not unhesitatingly make to your honor's back." But Chief Justice Clark himself had a keen sense of humor, was personally fond of Argo and really enjoyed this thrust.

Thirty-eight years ago, before the day of masculine women, Chief Justice Clark, North Carolina's first and greatest champion of woman suffrage—a man ever of keen discernment—while presiding as Superior Court judge, ordered the sheriff to escort a female to the bench for fine or reprimand for failing to remove her hat while in the court room. It is not absolutely certain that the judge mistook the woman for a man because this was long before women wore men's clothes and long before women in the South frequented court rooms. If the judge was aware that it was a woman and merely wished to remind her that unless she was a witness she was out of place in the court room, he did not at all events fine or reprimand her for she speedily departed; but it was made perfectly apparent the next day that his honor was decidely averse to headgear in the court room. The victim was an inoffensive, worthy and respected Hebrew who requested a lawyer to let him go with the lawyer to the court room to see the new judge who had made such a reputation as a disciplinarian, having fined himself for being late in attending court and fined two elderly and eminent members of the bar $100 each for just buffeting each other in the presence of the court and having explained that but for their ages he would have further penalized them by im-

prisonment. Afterwards when some one inquired of the Hebrew, "Have you seen the new judge?" he replied, "Vell yes, and he haff seen me. But it costed me den dollars. I valked straight up tu dur leetle fence before him and luked at him goot vidout hafin daken off my hat. Den dollars iss too much for tur see ur judge vith your hat on dur head."

John L. Bridgers tells the following concerning three famous old lawyers of North Carolina, Bartholomew F. Moore, Judge Strange of the Superior Court and Wm. A. Wright:

"Messieurs Moore, Strange and Wright
Met to drink and good cheer to exchange.
Said Moore, 'of us three
The whole town will agree
There's only one knave, and that's Strange.'
Said Strange, rather sore,
'I'm sure there's one Moore—
A terrible knave and a bite,
Who cheated his mother,
His sister and brother.'
'Oh, yes,' replied Moore, 'that's Wright.'"

And then he told the following, showing how Judge Gilliam swatted Judge H. L. Bond, formerly of the Federal Court. Judge Bond was holding court in Raleigh towards the end of reconstruction days and one of the lawyers in attendance was Judge Gilliam, then a practitioner. The evening of a day during which Gilliam had been mercilessly "ragged" by Judge Bond, who overruled every motion made by Gilliam and barely gave him a respectful hearing, the Judge and the bar were entertained at a dinner given by Major John Devereux. Roast pig was in the courses and the portion served to Judge Bond included an ear of the pig.

The Judge, who seemed not to have entirely discarded his domineering attitude towards Gilliam, offered his plate to Gilliam, remarking with an air of assurance that the act would be applauded as a good joke, "Here Gilliam, you take the ear; that should suffice for you." Judge Gilliam replied with mocked delight, "Exactly, your Honor, that is just what I have been striving for all day—an ear just like this, the ear of the Court."

Chapter XVI.

CONTESTED TITLE TO A HEAVENLY BODY—ASTRONOMY AND THE MAGNETIC NEEDLE—ATMOSPHERIC PHENOMENA—ACTUS DEI AND NEGLIGENCE.

EVEN with inanimate bodies celestial the courts of judicature of this mundane sphere sometimes have something to do! It may be that, analogously, the courts must sometimes regard bodies celestial in connection with conditions of this realm terrestrial during geological periods æons and æons ago. Also, it may be required that they consider the "glacial period" and planetary bodies even in applying the doctrine of ownership and replevin here among men. Indeed, atmospheric phenomena, nature's close secret concerning variations of the magnetic needle, and the solar system itself may call for impromptu discussion in administering laws applicable to actions in ejectment, establishing calls in a deed to land or in just common damage suits.

There has been just one lawsuit in the United States involving title to a heavenly body. It was in Iowa in 1892. Since the days of "bleeding Kansas" and "squatter sovereignty," a vast variety of curious things and theories and political isms have sprouted in the sister States of the West, been planted abroad, blossomed for a while and, fruitless, faded away. In the national museum of legal oddities there has remained for thirty-two years, uncalled for by plunderers for precedent, no rarer specimen than Goddard v. Winchell, contributed by the four-cornered, corn-and-sheep-raising State of Iowa.

The law says that fee-simple ownership of land vests title from the center of the earth straight upward into limitless space. The fee-simple owner of land owns the heavens above it, the top soil between and the earth beneath—half-way to China. But establishing calls of a deed in the aerial and remotest subterranean domains are as far from feasibility as perpetual motion and a mechanical cotton picker. Man has been forced to content himself with relative terra firma. It is well enough to know, however, that under a strict construction of the common law, had the Tower of Babel become a reality and had its roof, fifty miles or more from the earth, jutted even one inch over the line of an abutting owner, he could have compelled the corporate owners of the tower (assuming that the tower had been incorporated) to resize its roof so as to remove the one inch projection over the land of the abutting owner.

Again, the possibilities of science are infinite. Eventually will come stationary aerial garages and service stations for airplanes thousands of feet skyward. Lawyers who expect to practice twenty-five years hence may complacently look forward to an infinite multiplicity of actions in ejectment, and legislatures of the various State sovereignties may prepare to enact "blue-sky" laws entirely different from those of today and to create innumerable judicial districts to handle increased litigation. Therefore, ye judicial office-seekers, be of good cheer.

But, coming back to Goddard v. Winchell, 86 Iowa Reports, p. 71—"This 'not always there' and 'I found it' theory has other aspects," said plaintiff's counsel in his brief. "If tenable, why may not any one dig up a boulder of any size that lies half buried on my land? Geology demonstrates

beyond all dispute that the ice of the glacial period tore that boulder from some ledge of rock in Minnesota, bore it in its bosom southward, and finally dropped it ages ago on what is now my Iowa farm. Whatever is down into the soil becomes a part thereof, save in case of fixtures put there by human agency with intent to remove. How much more so when nature plants it there?" He was arguing in support of the plaintiff's title to a vagrant of the solar system—a meteorite, weighing sixty pounds, which had been turned loose by space and buried itself three feet in the plaintiff's land on the night of May 2, 1890, and which Peter Hoagland had dug up and carried away without the plaintiff's knowledge or consent and sold to the defendant for $105.

The defendant claimed under title by occupancy, that is, the taking of those things which belong to nobody; and abandonment, under the rule that "whatever moveables are found upon the surface of the earth, and are unclaimed by the owner, are supposed to be abandoned by the last proprietor . . . and belong in a state of nature to the first finder."

But the plaintiff claimed that it was his "shooting star," because when it struck his land and was buried in the earth it became a part of his real estate. The court agreed with him on the theory that when the piece of a lost or otherwise planet changes domicile and strikes this world it becomes a part of the land on which it falls and belongs to the owner of the land; that the doctrine of abandonment was eliminated, as it was hardly reasonable to suppose that there was an original owner in the sky who threw it away or who accidentally dropped it. Justice Granger, in delivering the opinion in this case, refers to meteorites as "telltale messengers from far-off lands," and further remarks that "a scien-

tist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are departures from other planets, and if among the planets of the solar system there is an interchange, bearing evidence of their natural composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property it would be if originally of this planet and in the same situation? . . . The subject of the controversy never was lost or abandoned. Whence it came is not known, but under the natural law of government it became a part of this earth."

A French decision is cited in 20 Albany Law Journal, 299, which holds that the finder of a meteorite and not the owner of the land on which it fell is the owner. But there are no other reported cases in this world, as far as can be ascertained, concerning property rights in portions thrown off from other worlds. So, under American jurisprudence, if a shooting star stops shooting and falls on your land, it's yours.

* * * * *

And compatibility is sometimes invoked between "star-eyed science" and the law of the land. Astronomy and the cause of variations in the magnetic needle were brought into discussion in a dull partition proceeding for the division of land in McCourry v. McCourry, 180 N. C., 510. Chief Justice Clark, delivering the opinion of the court, said: "It is common knowledge that there is a regular variation in the compass, which is different at different places on the globe, and the testimony of both surveyors is that in this locality the magnetic north is moving westward at the present one degree for every twenty years. Therefore, a line which ran due west in 1885 would now run 88¼ west. In the course

of time the variation will begin to swing back. . . . Until the discovery of the magnetic needle, which became known in Europe just before the discovery of America by Columbus, ships dared not put boldly to sea, but coasted along from headland to headland. Something over one hundred years ago it was discovered that there was a variation in the needle from the true north year by year and varying in different localities. Besides, the complete revolution of the earth on its axis every twenty-four hours, and its annual sweep around the sun, the earth has nine other regular movements—eleven in all—one of the latter being a change in the position of the poles of the earth moving in an ellipsis by which the 'north star,' which would be in exact prolongation of a line through the two poles of the earth, shifts its position, relative to our pole, which gradually moves to the west, and then in an ellipse returning to the east, and thus back to its original position.

"This compels a regular variation of the magnetic needle, which can be calculated years in advance. . . . Light moves at the speed of 186,300 miles a second, a speed which would carry it around the earth more than six times in the tick of a second by the clock. Light comes from our sun, which is over 93,000,000 miles away, in a little over eight minutes. The nearest fixed star (and all the fixed stars are suns) is 275,000 times farther from us than our sun, and it, therefore, takes light from it four and one-half years to reach us, but the north star is more than eight times farther off, and the light from it takes over thirty-six and one-half years to reach us. How and why that body, at such an incredible distance, should so control the magnetic currents on this tiny planet upon which we live, and why the magnetic

needle in all compasses varies with the slow wabbling of our poles relative to the north star, is not yet known. . . . It may be that the pole star has not this influence, but it always marks the true north. It never sets or rises like other stars, and the only change in its relative position to the earth is caused by the elliptic revolution of our north pole."

* * * * *

Atmospheric phenomena and *actus Dei* are considered and discussed in connection with negligence in Rector v. Power Co., 180 N. C., 622. This was an action to recover damages for the washing away of the surface of plaintiff's land in the great storm of 1916. The plaintiff contended that the damage was due to acts of defendant which resulted in phenomenal acceleration of the water flow during the storm. The opinion, which sustained the judgment of nonsuit in the Superior Court, is characterized by this eloquence of Chief Justice Clark: "The great sun, 1,300,000 times larger than the globe upon which we live, brooding over the tropical waste of water with untempered heat, rarified the atmosphere over the summer seas of the West Indies, at the same time drawing up by evaporation water which formed clouds above. The heavier air of the colder regions, north and south, impelled by the force of gravity, rushed in to fill the vacuum. The counter movement of the winds and the precipitation of the water caused a hurricane, which passed up the Atlantic coast. This, by some unknown cause, was diverted near Charleston and Savannah northwestwardly to the mountains. When over the upper reaches of the French Broad and the Catawba and neighboring streams, the electricity between the storm clouds and the earth caused a cloudburst. It could not be called a rain, but literally 'the windows of heaven

were opened and the waters descended.' The defendant or any other mortal power was not responsible for the damage caused by the abnormal height of the flood, nor responsible for negligence in not providing against it, if it could have been foreseen, the damage which would be done by so unprecedented a flood."

Chapter XVII.

THE DOG.

EFFORTS to humanize the dog contravene the spirit of the law. "Giddy and insecure" has been the legal standing of the dog—coddled in the home, kicked in the court. But the dog has changed the current of modern history and has been immortalized in story, poetry and song.

Wise old Socrates said that an increased acquaintance with man intensified his love and respect for his dog.

Byron wrote:

> "But the poor dog, in life the foremost friend,
> The first to welcome, the foremost to defend."

"The Talisman" tells that Richard I said: "The Almighty, who gave the dog to be companion of our pleasures and our toils, hath invested him with a nature noble and incapable of deceit. He forgets neither friend nor foe—remembers both benefits and injury. He hath a share of man's intelligence, but no share of his falsehood. You may bribe a soldier to slay a man, or a witness to take life by false accusation, but you cannot make a hound tear his benefactor. He is ever a friend of man, save when man incurs his enmity."

One who is acquainted with "Oliver Twist" readily recalls how the character of Bill Sikes' dog excelled the character of Bill himself.

CURRENT OF HISTORY CHANGED BY A DOG.

A spaniel changed the current of history by saving William of Orange from death by the Spaniards when they made a

surprise attack on his army at night and the sentinels at his tent were asleep. "The whole army was surprised and for a time powerless. They were butchered by the Spaniards from 1 o'clock in the morning until 3. . . . The boldest went at once to the prince's tent. He and his guards were in a profound sleep, but a small spaniel on the prince's bed was a more faithful sentinel. The dog barked furiously at the sound of footsteps, sprang forward and scratched his master's face with his paw. There was time only for the prince to mount a horse and escape. . . . But for the little dog's watchfulness William of Orange would have met an ignominious death. To his dying day the prince kept a spaniel of the same race in his bed chamber." (Motley's Rise of the Dutch Republic, vol. 2.)

This historical incident was recalled by Justice Earl in Mullaby v. The People, 86 N. Y., 365, and he was constrained to further remark that "when we also consider the faithful St. Bernard dogs, which rescue travelers caught in storms which sweep over crests and sides of the Alps, the claim that the dog is base in his nature is overthrown, and he cannot be left a prey to every person who chooses to steal or kill him."

DOG DAYS IN COURT.

Of course, dogs, like men, consist of innumerable types, but the old English law made no distinction; it disregarded all canine magnanimity and tabooed the entire species; it "set no store" by dogs—a dog was a dog. He wasn't even worth his "hide and tallow"; for the law did not regard as larceny the theft of a live dog, but it was larceny to steal a dead dog's hide. (Mullaby v. People, 86 N. Y., 367.) It

attributed to all dogs "baseness of nature," assumed that they were kept "for mere whim and pleasure," and, being unfit for food, were of no intrinsic value; that the penalty prescribed for larceny was too severe to apply to stealing so contemptible a creature as a dog. But George III, said to have been fond of the chase, caused the enactment of a law by which "the taking and carrying away of a dog was made punishable, but not as larceny."

In 1833 (Dodson v. Mock, 20 N. C., 282) it was held by the Supreme Court of North Carolina that to maintain an action to recover the value of a dog which had been poisoned by the defendant, it was not necessary to show that the dog was of any pecuniary value; that "dogs belong to that class of domestic animals which the law recognizes as objects of property, and that what the law recognizes as property it will protect from invasion."

But in 1876, thirty-eight years later, along came Stephen Holder, and, "at the instigation of the devil" and "with force and arms," stole "one dog, of the value of one dollar." The indictment was quashed and, on appeal, Justice Ashe said (seemingly with a tinge of disdainful curtness): "The defendant was indicted for stealing a dog. It was no offence at common law. The common law is the law of this State except where altered by statute, and we have no statute making it larceny to steal a dog; therefore, the indictment cannot be sustained." Hence, dogs, just so, are not the subjects of larceny in North Carolina (81 N. C., 527). But under the present law of North Carolina a dog may be converted into property by paying taxes on him. If this is done and the dog is stolen, he is stolen; otherwise not.

TO FIGHT IS A RESERVED RIGHT OF DOGS.

Even dog fights have been seriously discussed and considered in the effort to equate justice and balance its scales, for Justice Allen (in Wiley v. Slater, 22 Barb., 506) says, respecting a personal encounter between two New York dogs: "This is the first time I have been called on to administer the law in the case of a pure dog fight, or a fight in which the dogs, instead of the owners, were the principal actors. . . . The branch of the law, therefore, applicable to direct conflicts and collisions between dog and dog is entirely new to me. . . . I am constrained to admit total ignorance of the code *duello* among dogs. . . . Indeed, I was not before aware that it was claimed that any law, human or divine, moral or ceremonial, common or statute, undertook to regulate or control these matters, but supposed that this was one of the few privileges which this class of animals still retained in the domestic state; that it was one of their reserved rights (not surrendered when they entered the domestic institution) to settle and avenge in their own way all individual wrongs and insults. I am a firm believer with the poet in the semi-divine right of dogs to fight, and with him would say:

> " 'Let dogs delight to bark and bite,
> For God has made them so;
> Let bears and lions growl and fight,
> For 'tis their nature to.' "

It was held in this case, which was brought to recover damages for injuries to the plaintiff's dog, that the plaintiff must prove that the defendant's dog was the aggressor and was in the wrong; that in determining this fact the character of the defendant's dog was immaterial, etc.

* * * * *

A French justice was once troubled by the following case, and his decision is unknown: A cattle drover and a butcher while dining together undertook to adjust their accounts. The drover's dog was lying by the table. The butcher took a note for 100 francs and handed it toward the drover, and it fell in the gravy dish. The butcher snatched the note from the dish, and while waving it to and fro to dry it, the drover's dog, evidently supposing that the note was a morsel of food, snapped it from the butcher's hand and swallowed it. The butcher demanded that the dog be killed and dissected. The drover refused, and the butcher then claimed that the dog had collected his master's account and that he owed the drover nothing. The drover insisted that the dog was not acting within the scope of his duties and authority, and sued the butcher to recover the account. (Albany Law Journal, vol. 28, p. 360.)

* * * * *

SENATOR VEST IN A DOG CASE.

It has been said that in the trial of a Missouri dog case—Burden v. Hornsby—Senator Vest electrified the jury by this simple and forceful eloquence: "The best friend a man has in the world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and our good name, may become traitors to our faith. The money that a man has he may lose. It flies away from him perhaps when he needs it most. A man's reputation may be sacrificed in a moment of ill-considered action. The people who are prone to fall on their knees to do us honor when success is with us

may be the first to throw the stone of malice when failure settles its cloud upon our heads. The one absolutely unselfish friend that man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog. A man's dog stands by him in prosperity and poverty, in health and in sickness. He will sleep on the cold ground, where the winter winds blow and the snow drives fiercely, if he may be only near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encountering the roughness of the world. He guards the sleep of his pauper master as if he were a prince.

"When all other friends desert, he remains. When riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens. If misfortune drives the master an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying him to guard against danger, to fight against his enemies. And when the last scene comes and death takes the master in its embrace, and his body is laid in the ground, no matter if all other friends pursue their way, there by the graveside will be found the noble dog, his head between his paws, his eyes sad, but open in alert watchfulness, faithful and true in death."

An old newspaper report of this case said that the plaintiff sued for $200 on account of the death of his dog; that the jury awarded him $500 and wanted to hang the defendant.

Chapter XVIII.

A MULE.

INTO court once came a Tennessee mule which "had been found loitering about the streets of Nashville," said Justice Wilkes, "without any apparent business or visible means of support. . . . Although he did not appear to be drunk or boisterous, a vigilant officer of the police arrested him and took him to the lock-up. . . . The poundkeeper did not know who he belonged to and the mule made no disclosure of his ownership. The poundkeeper went to the market house to inquire of the butchers if a mule had escaped from any of them. Why he should suppose that a butcher's stall should be an appropriate place to find out the owner of a living mule does not appear." This exquisite ludicrousness then merges into expression of sober thought concerning municipal ordinances.

Chapter XIX.

A CROSS-EXAMINATION BY ABRAHAM LINCOLN.

COMMENTING on an article in this series which suggested that probably "the psychological moment" in the course of a trial was the time when a lawyer should "rest" his case,* a distinguished practitioner suggested that an equally important crisis was when *not* to cross-examine a witness. The experience of every practitioner has doubtless caused him to form his own rules and theories respecting this important crisis. Chief Justice Stacy's observation has convinced him that a lawyer should never, under any circumstances, cross-examine a mother who is a witness for her daughter or her son; but, of course, there are few general ironclad rules to be observed in conducting every cross-examination; all must depend on the lawyer's intuition, common-sense, knowledge of human nature and sound judgment. Many profound lawyers have no qualifications necessary for a successful practitioner, and many successful practitioners have a limited knowledge of law.

A great trial lawyer who is a veritable lion before a jury may be but a limp lamb in arguing intricate questions of law before the Supreme Court, especially if disconcerted and thrown from the carefully prearranged order of his argument by an unexpected question from a member of the court.

Perhaps there is no truer test of a lawyer's skill as a practitioner than his ability, by cross-examination, to convert the testimony of a hostile witness into testimony in aid of his own client or to show its falsity.

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*"When to Rest," p. 31.

I recall Edward Eggleston's account in "The Graysons" of a murder trial in which Abraham Lincoln appeared for the prisoner and which ascribes to Lincoln great skill as a trial lawyer. According to the story, "Tom Grayson" was being tried for shooting to death his friend, "George Lockwood," near a camp meeting in Indiana on a certain night in August. There was evidence of a game of cards between deceased and the prisoner, in which the prisoner lost all his money, his coat and his hat. The pistol offered in evidence was identified as the pistol found near the dead man, and there was strong evidence connecting the prisoner with the crime. But, notwithstanding this and other evidence most conclusive of the prisoner's guilt, Lincoln stood every witness aside without cross-examination and sat in moody silence without a law book at hand or so much as a scrap of paper. The members of the prisoner's family and his friends marveled at this indifference and questioned whether they had not made a mistake in trusting the prisoner's life with a young and apparently incompetent advocate. The star witness for the prosecution, who had been reserved to cap the climax of evidence against the prisoner, was sworn, and gave direct testimony that he witnessed the murder; gave a detailed account and testified that he was "twenty feet or more" from the spot where the murder occurred; that it occurred at 10 o'clock at night, and that he heard the deceased pleading with the prisoner to spare his life, and saw the pistol in the prisoner's hand, and that it "looked like the pistol" which had been offered in evidence. Lincoln was apparently aroused from a dream by the prosecuting attorney's remark, "You have the witness, Mr. Lincoln." The prisoner's mother trembled from an awful fear "lest Lincoln would also stand

this witness aside, as he had done all the others." But, no! Lincoln slowly arose, and for a few moments silently regarded the witness. Then—

"You said you were with the deceased just before the shooting?"

"Yes."

"Were you not pretty close to him when he was shot?"

"No, I wasn't."

(The witness evidently supposed that the lawyer wished to make it appear that he was nearer the scene and perhaps implicated.)

"Are you sure you were so much as ten feet away?"

"I was more than twenty," the witness replied.

"What had you and the deceased been doing together?"

"We'd been talking."

(The witness seemed to take alarm at this line of questioning.)

"Oh, you had?"

"Yes."

"In a friendly way?"

"Yes, to be sure; we never had any fuss."

"You parted from him as a friend?"

"Yes; of course."

"By the time the prisoner came up you'd got—how far away? Be careful now."

"I've told you twice. More than twenty feet."

"You might have been mistaken about it being the prisoner, then?"

"No, I wasn't."

"Did you know it was the prisoner before he fired?"

"Certainly I did."

"What time of night was it?"

"'Long towards ten, I should think."

"It might have been eleven?"

"No, it wasn't later than ten."

"Not before nine?"

"No, it was on to ten, I said."

(The witness showed irritation and excitement.)

"How far were you from the pulpit and the meeting place?"

"Between half a mile and a mile."

"Not over a mile?"

"No; scarcely a mile."

"But don't you think it might have been a little less than half a mile?"

"No; it's near a mile. I didn't measure it, but it's a mighty big three-quarters."

(All wondered at what point in the witness' armor the lawyer was driving.)

"You didn't have a candle in your hand at any time during the evening, did you?"

"A candle—no; what would we have a candle for?"

"Did the prisoner or the deceased have a candle?"

"Of course not. What would they have candles for?"

"Where were the lights on the camp ground?"

"Close by the preacher's tent."

"More than three-quarters of a mile from where the murder took place?"

"Anyway, as much as three-quarters."

"How far away were you from where the murder took place?"

"Twenty feet."

"You said 'or more' a while ago."

"Well, it was no less. You don't think I measured it, do you?"

"Then, there were no lights less than three-quarters of a mile away?"

"No," said the witness, perspiring, as he saw Lincoln's trap opening for him.

"You don't mean to say that the platform torches three-quarters of a mile away gave any light, and in the woods, too, do you?"

"No; of course not."

"How could you see the prisoner, then, when he fired the shot, if the only light was nearly a mile away and inside a circle of tents?"

"Saw by the moonlight," answered the witness, desperately.

"What kind of trees are there?"

"Beech."

"Beech leaves are pretty thick in August?"

"Yes, rather," gasped the witness.

"And yet light enough from the moon came through these thick beech leaves for you to see and identify the prisoner?"

"Yes."

"And you could actually see the prisoner shoot?"

"Yes."

"And you fully twenty feet away?"

"Well, about that; nearly twenty feet, anyway."

"And you pretend to tell this court that by the moonlight you got through the beech leaves in August you could even see the pistol in the prisoner's hand?"

"Ye-es" (the witness now stood on one foot).

"And you could see what kind of pistol it was?"

"Yes, I could," answered the witness doggedly.

"And how long the barrel was, and you twenty feet away?"

"I've got awful good eyes and I know what I see," whined the witness.

The story recites that Lincoln, after regarding his uneasy victim for a while, thrust his hand into the tail pocket of his coat and drew forth a small pamphlet, turned the leaves with extreme deliberation while the courtroom was utterly silent. He held the victim in the rack and let him suffer. At last he fixed his thumb on a page and addressed the judge: "May it please your Honor, this witness has sworn over and over that he recognized the prisoner as the person who shot the deceased on a night during last August and that the witness was standing at the time twenty feet or more away, and that the scene of the shooting was nearly a mile distant from the torches inside the circle of tents at the camp meeting.

"So remarkably sharp are the eyes of this witness that he even saw what kind of pistol the prisoner held in his hand, and he is able to identify this pistol of the prisoner as the identical weapon. All these things he saw and observed—saw and observed them at 10 o'clock at night by means of moonlight shining through the trees—beech trees in full leaf. How much light does even a full moon shed in a beech woods like that at Union camp grounds? Not enough to see your way by, as everybody knows who has had to stumble through such woods. But I would like to have the jury look at the almanac which I hold in my hands. They will see that on the night of the 9th of last August, when this extraordinary witness saw the shape of a pistol twenty feet away at 10

o'clock by moonlight, the moon did not rise till half-past 1 in the morning."

Lincoln, by some intuition, had divined that this witness was the real culprit and had concentrated all the work of defense along the line of that theory, which proved correct. The prisoner was acquitted and the prosecuting witness was tried and convicted.

Chapter XX.

THE SANCTITY OF THE HUMAN BODY—RIGHTS OF A CORPSE.

IT is well enough to be careful how you treat a human body, whether it is your own body, somebody else's body, or a dead body or a live body.

You cannot maim yourself and you cannot even try to kill yourself. The law is very keen in its regard for the human body. In fact, the law cares a great deal more for some persons than they seem to care for themselves. You can't even scare a human body, for you will be punished if you threaten to beat a man, but don't even touch him. This is an assault. And if you do just touch him wilfully or in anger, the law says you have committed a battery.

It all depends on your state of mind and how you feel about what you are doing. For instance, if a man gets mad with a woman and spits in her face, she may compel him to respond in damages, as held in Draper v. Baker, 61 Wis. Rep., 450; but if a man breaks his wife's ribs while affectionately hugging her, he is guilty of no crime, as held in Queen v. Clarence (an English case), 22 Q. B. Div., 23.

But it is unwise to be too familiar with a person's body under any circumstances, for it's against the law to touch a man to awaken him in order to present a bill, whether you are angry with him or not, as held in Richmond v. Fiske, 160 Mass. Rep., 34.

It's also against the law to offer violence to anything even connected with the human body. You are guilty of an assault if you get riled with a man and strike a horse attached to a wagon in which the man is riding, or if you

strike, in anger, a cane which another is carrying. Clark v. Downing, 55 Vt., 259.

Perhaps an extreme case is State v. Davis, 17 S. C., 46, decided in 1833. This case held that where one had the lawful possession of a slave, chained to his bedpost and confined to his person by a rope, and another broke the chain, cut the rope and carried off the negro, the offender was guilty of an assault upon the person having the custody of the slave.

Nor will the law condone too much rough play by a secret society in administering its rites to a member. State v. Williams, 75 N. C. Rep., p. 134, brings into court a lodge of "The Good Samaritans," that time-honored creation of negro benevolence. The facts in the case disclose that the prosecutrix, a dusky damsel who was a member of this society, had been adjudged a miscreant, and it was decreed that she be expelled.

Expulsion consisted in tying a rope around the body of the member and suspending her from the wall of the building. The frantic resistance of the prosecutrix to this procedure caused the entire dress to be torn from her, and in an almost nude condition she was finally roped and duly suspended from the second story of the building. She indicted the members of the lodge for assault and battery, and the Supreme Court sustained the judgment of guilty rendered by the trial court.

Of course, the law will not permit you to use the person of another as a bomb proof. The great financier, Russell Sage, deliberately did this, as shown in Laidlaw v. Sage, 80 N. Y., 125. The plaintiff in this case entered Mr. Sage's business apartments a short while after the entrance of another person, who had handed Mr. Sage the following

startling communication: "The bag I hold in my hand contains ten pounds of dynamite, and if I drop the bag it will destroy this building and kill every human being in it. Give me one million two hundred thousand dollars, or I'll drop the bag. Yes or no?" Sage, as the facts imply, was apparently not greatly disconcerted by this unique money demand; he deliberately walked to where the plaintiff was standing in an adjoining room and, after taking refuge behind his person, refused payment. The bag dropped and there was a terrific explosion which killed the dynamiter and threw the plaintiff and Sage upon the floor, the plaintiff being severely injured. The Supreme Court of New York held that the plaintiff's action against Sage was well taken and that it devolved upon Sage to prove that his using the plaintiff as a bomb proof did not cause the plaintiff to be hurt worse than he would have been if Sage hadn't used him.

In felicitating the public, perhaps even the cartoonist is constantly in danger, not only from personal violence by the victim of his art, but by a stroke from the strong arm of the law. At least, there is an ancient authority for this proposition. It is found in a case decided in 1817 and reported in The New York City Hall Recorder, vol. 2, p. 113. An artist named Francis Mizzara requested a lawyer named Palmer to give the artist a sitting for a portrait, free of charge, the artist claiming to have discovered an attractive peculiarity in Palmer's physiognomy. Perhaps the artist was liberal in portraying the alleged peculiarity, for Palmer was very much displeased with the portrait and offered to buy it. The artist wished to keep the portrait as a specimen of his skill, and at first refused to sell it, but changed his mind and afterward offered to sell the portrait to Palmer.

But they could not agree on the price, and Palmer refused to buy at the artist's figure. The artist then sued Palmer for the price of his work, and the case was decided in favor of Palmer and an execution issued against the artist to recover the costs of the action. Among the property of the artist seized by the sheriff was the portrait of Palmer. In the meantime, however, the artist had embellished this specimen of his skill by appending the ears of a jackass to the portrait, and the artist went so far as to advertise in a newspaper the sheriff's sale of his portrait and to call special attention to the portrait of Palmer. Palmer caused the artist to be indicted for libel, and the artist tried to excuse the ass ears by pretending that he merely intended to transform Palmer's portrait into a likeness of King Midas, the ass-eared monarch of mythology. But this wouldn't pass, and the artist was fined $100.

RIGHTS OF A CORPSE.

It seems that the right of property in a human corpse has never been the subject of legal controversy in North Carolina. The rare conservatism of its people is hardly more commendable than their frugality in spending time on dead issues. This subject is almost too gruesome to pursue, but it is interesting and it is well enough to know that corpses have rights as well as other people and are entitled to a decent burial. There is a statute in North Carolina which consigns to medical colleges certain corpses, but, according to some authorities, a corpse's right to decent burial may be enforced by civil action at the instance of the husband or wife, father, mother, or next of kin of the corpse. The Albany Law Journal (vol. 4, p. 56) gives an interesting instance where the

courts entertained such an action. This was an Ohio case decided in 1817. The body of the plaintiff's wife was delivered to surgeons for the purpose of post-mortem examination. The surgeons did not comply with their promise to give the corpse a decent burial, but put a "dummy" in the coffin. The fraud was discovered and, after threats of criminal prosecution, the surgeons delivered the body to the husband. He then instituted a civil action against the surgeons for the outrage committed, to which there was a demurrer upon the ground that there was no property in a dead human body. Demurrer was overruled, the courts holding that there was a *quasi* property right in a corpse for the purpose of burial, and that such right could be enforced by civil action. According to Guthrie v. Weaver, 1 Missouri App., 156, this *quasi* right of property ceases after the corpse has been buried, and it is not then the subject of property.

A Pennsylvania case also holds that a wife has no control over the body of her deceased husband after burial; its disposition thereafter belongs exclusively to the next of kin. 42 Penn. St. Rep., 293.

A Rhode Island case holds that persons having charge of a corpse hold it in trust, and that the courts of equity will enforce the trust. 10 R. I. Rep., 227.

In England the ecclesiastical courts have control of a corpse, and at one time it could be arrested and detained for debt. Jones v. Ashburnham, 4 East's Rep., star p. 460.

Chapter XXI.

BURGLARY, AND WHEN IS A "CHIMNEY" A CHIMNEY?

ALONE in the solitary swamp lands of Chowan County in a one-room log cabin lived Judy Ross. The theft of her bacon sixty-five years ago almost caused the Supreme Court of North Carolina to decide what is a chimney. As respects burglarious breaking and entering under the law of that State, the question, What is a chimney, or when is a "chimney" a chimney? is undetermined.

Judy's habitat was not suggestive of remuneration to burglarious enterprise, but the wanton Willis, a black slave, was wise respecting its contents. The chimney, five feet and one-half high, constructed of mud and sticks, and the top covered with loose boards, was more enticing than antagonistic to his predatory proclivities. It required no skill and little caution for him to remove the boards, step into the chimney, squat, enter the room, take Judy's bacon, and retire without disturbing her slumber. Willis was apprehended, tried, and convicted of burglary.

COULDN'T SEE THE CHIMNEY.

Chief Justice Pearson conceded that entering a dwelling at night through a chimney to rob the house was, according to well-established precedents, a burglarious breaking, but he couldn't see the chimney.

"It is true," said he, "the structure is called a chimney in the statement of the case, but the description of it presents the question, Is it a chimney within the meaning of the law

in reference to burglary? My conclusion is that the opening or structure, or chimney—call it what you please—must be such an one as may be reasonably relied on for protection against felonies, which is a question to be decided by the court upon the facts of each case. The purpose of a chimney requires that it shall be open, but, in order to bring it within the principle, the structure must be such an one as may be reasonably relied on for protection; for if it be partly rotted down, so as to be no higher than a man's head, and as easy to enter as a window with a sash out, it must stand on the same footing. In the case before us, the top had rotted off, and but for the few loose boards laid over it to keep out the rain (upon which fact no stress is laid), a smart dog could easily have jumped in and have stolen the lady's meat; and if one or two more rounds had been off, an enterprising old sow could have performed the same feat. I cannot bring my mind to the conviction that to enter through such a hole constitutes the crime of burglary, nor am I satisfied, by calling this structure a chimney, to relieve myself from the difficulty of distinguishing between the different kinds of chimneys and say that a chimney is a chimney."

But the itching question remained unscratched. Justice Battle, for a majority of the court, said: "Any attempt to make a distinction between the different kind of chimneys will be attended with great difficulties and lead to much uncertainty and confusion. Where will the dividing line be drawn? If any entry through a chimney in a certain state of decay and only five feet and a half high is not a burglarious one, in how much better condition and how much higher must it be before the law will recognize it as a protection against nocturnal invaders? We are unwilling to take the

task of answering and are content to hold that the chimney as described was such an one as could not be entered by a thief in the night without committing the crime of burglary." (State v. Willis, 52 N. C., 190.)

THE CRIME OF BURGLARY.

Theoretically, at least, every one's dwelling-house is his "strong fortress," and the law guarantees him complete security in enjoying it as a home.

Before chapter 434, North Carolina Laws, 1889, which divided burglary into two degrees by distinguishing between hours and time when the dwelling was actually occupied, the common law obtained in that State, and the death penalty was prescribed against one who broke and entered a dwelling-house or a house within the yard to a dwelling-house used as a part of the dwelling at any hour during the night with intent to commit a felony therein. Breaking and entering and having felonious intent constitute the crime, for it has been held that if one breaks and enters a dwelling-house at night, having intent to commit a felony, the crime of burglary is consummated, though after entering the house he desists from an attempt to commit the felony. (State v. McDaniel, 60 N. C., 246.)

To meet the ingenuity by which crime is ever ready to thwart the law, it has been held that there may be a "constructive" breaking or entering; that it is not necessary for one to resort to locks or bolts in securing his home against intrusion and that there is a "breaking" within the meaning of the law if entrance is had by raising a window or opening a door secured by its own weight; or there may be a

constructive breaking where entrance is obtained by threats or by inducing a servant within the house to remove the fastening or by some trick to induce the owner to remove the fastening.

During Queen Anne's reign a law was enacted which rendered one guilty of burglary who concealed himself in a house during the day and at night robbed the house and broke out instead of breaking in and this is the law in North Carolina today.

CONSTRUCTIVE ENTRY—THE FINGER CASE.

The crime of burglary in the first degree is not complete under the North Carolina statute without actual entry even after actual breaking, but the English courts, as late as 1823, recognized under the common law a constructive entry. In Rex v. Davis (Russ, and R., 499)—"the finger case"—it was held that where a thief broke a window and stole articles within the house, there was sufficient entry to constitute burglarly and make it a capital felony, although his finger was the only portion of his body which entered the house, and "when thieves came to rob a house and having by threats induced the owner to open the door, a contest ensued, and in the contest one of the prisoners discharged a pistol into the house and in so doing his hand was over the threshold, but no other part of his person, it was adjudged burglarly and punishable by death." This constructive entry in a charge of burglarly in the first degree has never been recognized in North Carolina.

State v. Henry, 31 N. C., 463, presents an able and interesting discussion of constructive breaking. All three of the

justices rendered opinions in this case, Chief Justice Ruffin dissenting from the conclusions of Justices Pearson and Nash. The prisoner after giving the prosecutor the false information that his mother's house two miles distant was on fire and thus inducing him to leave home, entered his house through the door which was left unfastened, about 15 minutes after the prosecutor left, and robbed the house. The majority of the court held that there was no constructive breaking, because the entry was not immediately made and a sufficient time had elapsed for the prosecutor's family to refasten the door which was actually closed. Reason seems to be on the side of Chief Justice Ruffin, for in any view the prisoner was guilty of that constructive breaking which the law imputes to entering by lifting the latch or turning the knob of an unbolted door, or raising a window held in place by its own weight.

A YOUNG MOUNTAINEER'S DARING RESISTANCE TO FOUR DESPERATE BURGLARS.

The greater one's fear the greater his courage if he masters the fear. But the man who, when disadvantaged by even one burglar or highwayman, meekly submits, may be as courageous as he is wise.

A most daring and fearless resistance to burglary is shown by the evidence in State v. Foster, 129 N. C., 704. Samuel H. Alexander, a man something over 20 years of age, was the clerk in a store at Emma, a village near Asheville, North Carolina. He occupied a room adjoining the store as a sleeping apartment, the store and Alexander's bed room being connected by a door. On the night of February 8, 1901, be-

tween 8 and 9 o'clock, after the store had been closed, Alexander was called to the door by persons who said they wished to buy goods. When Alexander unlocked the door it was suddenly pushed open by two men who covered Alexander with pistols and these men were accompanied by two others. The men who had covered Alexander with pistols shoved him back into the store and forced him to precede them into his bed room, the door to which was open. They searched his room, found and took his pistol and then forced him back to the store room. Alexander obeyed the command to open the safe and one of the burglars who was guarding him laid Alexander's pistol on the counter and began to rifle the safe. While the burglar was so engaged, his companion in the store (for two had remained outside to guard the front door) was attracted by a noise outside the back door and went to investigate. Alexander then seized his pistol and shot both burglars, severely wounding them, and a spirited duel ensued, both burglars firing on Alexander and he returning the fire until the burglars fled. Alexander was so severely wounded that he could barely crawl to the porch. His feeble "life and death cry of distress" was heard by a brother Mason and he was rendered sustenance and recovered. The store was a United States post office and contained a government safe. The federal government appropriately recognized Alexander's heroism, by making provision for retaining him in light employment during his life. All four of the burglars were apprehended, tried for burglary in the first degree, convicted and executed, the Supreme Court overruling the contention that under the act of 1889, burglary in the first degree was not committed because there was no actual breaking into the sleeping apartment, the door thereto

being open when the burglary was committed. All the burglars had come direct from Ohio and one of them when on the gallows stated that he hoped God would be merciful to people who took a man's life for committing burglary and that had he known burglary was a capital felony in this State he would not have committed the crime here. Here is the admission of just one desperate criminal, but it serves the purpose of "the leaf in a storm"; it is a pointer in the frenzy and madness of crime.

Chapter XXII.

A JACKASS AND THE LAW.

Speaking of people calling the law "an ass" brings to mind an old case in which a donkey established a rule respecting concurrent negligence. This rule is known as "the last clear chance" and it was started in England 83 years ago by a donkey which was tied in the public highway. A distinguished railroad attorney has told me that the donkey showed as much sense in starting the thing as the North Carolina courts have shown in keeping it up. The rule of "the last clear chance" is substantially that where the negligence of both plaintiff and defendant caused injury to the plaintiff, the plaintiff may, notwithstanding his own negligence, recover damages by reason of the negligence of the defendant, if it can be shown that the defendant had "the last clear chance" by exercising due care, to avoid the accident, and that the plaintiff could not, by exercising due care, avoid the result of defendant's negligence.

Davies v. Mann, 10 Meeson & Welsby Rep., 546, decided in England in 1842, is credited with having first enunciated this doctrine, though the report of the case cites earlier decisions. Anyway, Davies v. Mann is the putative parent of "the last clear chance," which has been to railroad companies an imp of Satan for 83 years. It holds that, "The general rule of law respecting negligence is that although there may have been negligence by the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover. Therefore, where the defendant negligently drove

his horses and wagon against and killed an ass which had been left in the highway fettered in the forefeet, and thus unable to get out of the way of the defendant's wagon, which was going at a smartish pace along the road, the jury were properly directed that although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover."

It therefore follows that when a human ass goes to sleep on a railroad track the engineer of a passing train has not the right to run over him; and that if the engineer does so when he might, by exercising due care, have stopped the train in time to save the human ass, the railroad company must respond in damages.

"Due care" is supposed to be that degree of care which is ordinarily exercised by the prudent man.

TURKEYS AND GEESE DISTINGUISHED.

In North Carolina damages may in some instances be recovered of a railroad company for killing turkeys but in no instances perhaps for killing geese.

The late Chief Justice Walter Clark was not only a great lawyer—he was a fine turkey hunter. And he knew all about wild and domestic fowls too. This fact is established by Lewis v. R. R., 163 N. C., 33 and James v. R. R., 166 N. C., 573. "The turkey is a nervous fowl," observed the Chief Justice; and further, "from the known characteristics of turkeys, a flock of them feeding on a track, might not notice that a train was approaching or attempt to fly. But, as when a gun is discharged close by, if there had been a sharp blow of the whistle the turkeys would have doubtless

taken to wing or have run. They are very timid, if alarmed, but are not alert to perceive danger. It is true it is necessary that the jury find not only negligence on the part of the defendant, but that such negligence was the proximate cause of the injury." Having shown how easily turkeys may be frightened and dispersed the Chief Justice proceeds to show that it is well-nigh impossible to frighten and disperse geese, and that the engineer must blow the whistle and sound the bell to disperse turkeys on the railroad track in front of an approaching train, but is not required to do so to frighten geese because it is useless. "Geese are phlegmatic and slow of movement," observes the Chief Justice; "the blowing of the whistle or ringing the bell would not make them run or fly. On the contrary the approach of the train would more likely cause them to huddle up in conference or to stretch out their necks to oppose the passage of the engine. In the absence of evidence showing actual negligence, the mere fact that the whistle was not blown or the bell rung did not authorize the court to submit the case to the jury." A railroad company is not liable anyway for killing geese which are permitted to run at large and trespass on a railroad track unless the company, through its agents, has been wantonly and recklessly negligent.

And "geese have too much dignity or are too combative to flee promptly from danger." And he approved the observation of L. G. Cooper, counsel for defendant in the goose case—"Can an engineer determine what are the negotiations of a flock of geese in a field or even on the track, when they put their heads together?" "We are cited," it is further said by the Chief Justice, "to the classic legend in Livy (Book V. ch. 47) when Rome was saved by the cackling of geese

. . . This however, was not due to the alertness of those birds to flee from danger, but to their well known wakefulness at night. If the Gauls had blown their trumpets at night, the geese instead of promptly getting out of the way, would simply have raised more clamor and hissed the warriors on both sides."

So even if a bull yearling on the track at a sharp curve, in the night time, stays there and butts the engine, after the whistle has been blown and the bell rung, the railroad company is prima facie negligent; and the engineer must exercise due care to preserve the lives of turkeys clustered on the track, but the old goose "gets it in the neck" under almost any circumstances and the owner gets only the feathers. *Ita lex scripta est.*

Chapter XXIII.

THE RULE IN SHELLEY'S CASE.

WHEN THE LAW DISREGARDS A BEQUEST IN A WILL.

WHAT is this 'Rule In Shelley's Case' anyway? Does it refer to poetry?" a layman once inquired of A. Hall Johnston, a brilliant young North Carolina lawyer and whereupon Johnston immediately replied, "Yes; it's like this:

'A man named Shelley—by no means a fool—
Went into court and established a rule;
He came out of court, laid down and died,
But the rule he established is to this day applied.

The rule as expounded by the great Lord Coke
Must be seriously taken and not as a joke;
For Shepherd, Chief Justice, in Starnes v. Hill,
Says the ruling of Coke remains with us still.

To put in poetry is found very hard
To one who does not claim he's a bard;
But the rule thus stated is entirely correct,
So heed it and ponder, but do not reject.

Who takes an estate by gift or by deed,
To himself for his life and then to his seed,
And in the conveyance is used the word 'heirs,'
The word so employed in no way impairs
The taker to hold absolutely in fee
As though he'd taken by judicial decree,'"

which the layman thought was more loose than lucid.

If one wishes, by his will, to convey land by giving a title to it for life to one person and after that person's death to give the land absolutely to another, the would-be willer had

best employ a very good lawyer to write his will and not attempt to do so himself.

Persons who write their own wills, be they lawyer or laymen, are more apt to devise a law-suit than a legacy, making pat the lawyer's toast to

"The jolly testator
Who makes his own will."

Even the great lawyer, Samuel J. Tilden, was not an exception to the rule.

The rule of property, laid down in Shelley's case, during the reign of Elizabeth is said to have been first enunciated during the reign of Edward II as a *tenet* of the common law. It has been abolished in England but is still the law in North Carolina and in many of the American states, as declared by the learned opinion of Chief Justice Shepherd in Starnes v. Hill, 112 N. C., Rep. 1. Having originated from the common law of England it cannot be abolished in a State where the common law obtains except by legislative enactment. In Starnes v. Hill it was contended that the rule was abolished by sec. 5, ch. 43 of the Revised Code of North Carolina, brought forward as section 1329 of The Code of 1883. The Supreme Court held in the case just cited that the statute relied on did not abolish the rule. The rule in Shelley's case holds that the word "heirs" used in a will or deed defines the nature of the estate taken by the first devisee. Thus (in Tyson v. Sinclair, 138 N. C., 23) a will read, "I devise to my grandson my store house and lot during the term of his natural life, then to the lawful heirs of his body in fee simple; on failing of such lawful heirs of his body then to his right heirs in fee." The court

held that the grandson, notwithstanding the words, "during the term of his natural life" and the concluding words of the devise, took an absolute estate in fee simple, because of the words, "heirs of his body."

In Starnes v. Hill, Chief Justice Shepherd thus quotes, 2 Minor Institutes, 395: The rule controls the intention of the grantor or testator "so far as it is repugnant to the policy of the law, giving effect to the general and legal, rather than the more particular and prescribed intent." (The law abhors perpetuities and the endless entailing of estates.) "The party making such a limitation has in his mind two purposes, which are legally in conflict. One is to give the ancestor only a life estate; the other to limit the land to his ancestors collectively and in indefinite succession. These two intents cannot stand together without more or less of general mischief to the public welfare, and the rule prevails simply to subordinate the particular and apparently less important design of limiting the ancestors' interest to a life estate, to the more comprehensive, and probably the preferred purpose."

Judge Stacy gives the latest construction (1922) of the rule in Shelley's case in North Carolina in Pierce v. Griggs, 184 N. C., 13, and the rule is there clearly defined and explained.

Chapter XXIV.

FEAR AND FALSE CONFESSIONS OF GUILT.

FREQUENTLY newspapers tell of one who has been arrested on suspicion of guilt being given some superlative degree of punishment to extort a confession. In view of the spirit and policy of present-day law and what is plainly prescribed, it is hard to understand why this practice is condoned and how a statement made under terrible duress can be admitted as evidence. The foot and hand pincher, suspending a prisoner by the thumbs and other instruments and methods of torture to secure material for the gibbet and guillotine, were long ago discarded by modern civilization. They were supposedly stopped by reason of the humane doctrine that a confession extorted by human suffering is inadmissible as evidence—how much more credible is a confession which is wrested by hope or fear?

"Fear," says Dr. James K. Hall, "is the most dominant of all human emotions. It may be thought of as a feeling of mental displeasure associated with a painful or an uncomfortable condition of the body. It is the imminent threat against the integrity of one's own physical and mental personality that determines that complex emotional and physical state which we call fear. Fear affects not only the mind and the feelings, but also the body. The mind—the whole physical and nervous being, indeed—is out of tune in the presence of fear. Fear produces mental and physical inadequacy."

"Evidence of verbal confessions of guilt," says Greenleaf, "is to be received with great caution. For besides the danger of mistake from the misapprehension of witnesses the misuse

of words," etc., "and the infirmity of memory, the mind of the prisoner is oppressed by the calamity of his situation and he is often influenced by motives of hope or fear to make an untrue confession."

This notable instance of an untrue confession of murder is given by Greenleaf himself on p. 275 (14th edition) of his work on Evidence. Two brothers named Boorn were convicted of the murder of their brother-in-law Colvin in Vermont about 1819. Colvin was weak-minded and was supported by the family of the Boorns who regarded him as a burdensome nuisance. Colvin disappeared mysteriously and not being seen for five or six years, it was suspected that he had been murdered. Suspicion rested on the two brothers when it became known that on the day of Colvin's disappearance he had a quarrel with the Boorns, while at work with them in the field and was struck by one of them on the head and knocked to the ground and that his hat had been found in the woods near by, about two months afterwards. One of the neighbors began to have dreams that the Boorns had committed the murder and upon a search in the field where the altercation occurred and in the woods near by, the pocket knife of Colvin and some buttons from his clothes were found and also two finger nails and the bones of a man were discovered in a hollow stump. Upon this evidence and their confession that they had murdered Colvin, the two Boorns were convicted and sentenced to die. The prisoners applied to the Legislature for a commutation of sentence which was granted to one of them. The confession was then withdrawn and denied by the prisoners and there was a reward offered for Colvin. He was finally found in New Jersey and returned home in time to prevent the execution of the

brother who was denied commutation of sentence. The Boorns had been advised by friends that they would certainly be convicted and that they would perhaps secure a commutation of the death sentence if they made a confession.

A Scandinavian pastor named Quist was convicted of murder and executed, upon an admission of guilt which afterwards proved untrue. Quist had a beautiful daughter who was annoyed by the addresses of a man named Bruns, who was generally regarded as a bad man. Bruns' brother Niel was employed by the pastor, Quist, as a gardener and was inefficient and lazy. His indolent habits so provoked the pastor, who though devout was quick tempered and impulsive, that he struck Niel with a spade. Niel ran off into the woods and after long and diligent search, could not be found. Bruns charged the pastor with murdering his brother and another man stated that the night after Niel's disappearance he saw the pastor digging in his garden as if burying something. This was corroborated, the garden was searched and a human body, having on Niel's clothes was unearthed. The pastor confronted with this evidence, although disavowing recollection of having committed the crime, admitted that he was given to somnambulism, that he sometimes wrote sermons during his sleep and that he must have unconsciously killed and buried the man. Twenty years after the execution of the pastor the missing man returned. Bruns and others planned the mysterious events. They had driven Niel away, threatening to kill him if he returned, and they disinterred a body in a neighboring burying ground and buried it in the pastor's garden.*

*The Green Bag, Vol. 1, p. 327.

Chapter XXV.

WOMEN.

CONSONANT to those times and to our own somewhat recent past, Shakespeare (several hundred years ago) made one of his characters say of his wife:

> "She is my goods, my chattels; . . .
> My horse, my ox, my ass, my anything."

Accepting Scripture that in the dawn of creation evil opposed good and woman was the first recreant, even for that sin, she has made no "shadowy expiations." Nature's law made woman humanity's greatest sufferer and man made marriage and even motherhood—(that supreme and sublime factor for good and righteousness)—conditioned on legal nonexistence, a nebulous state of sub-alternation and a mere hazy ingredient of personal entity. And this even in the "age of chivalry"; for Blackstone says that under the Common Law of England "by marriage husband and wife are one person and the very being or legal existence of the woman is suspended."

Notwithstanding this oneness, Blackstone also says that the husband is the wife's "baron or lord" and yet the husband "cannot grant anything to the wife or enter into covenant with her because to covenant with her would be only to covenant with himself." And, to further queer the theory of oneness, he adds, "A woman may be attorney for her husband for that implies no separation from, but rather a representation of her lord"—when he has just said that a husband couldn't covenant with his wife because that would

"be only to covenant with himself," as husband and wife are one person. So it would seem that the husband is both himself and the wife's self, but the wife is only the husband's self, yet the wife can be herself to do a job for the husband as his representative, but cannot become herself to be his beneficiary.

And again, "in criminal prosecutions the wife may be indicted and punished separately" because the oneness between husband and wife is only a *civil* one. And although husband and wife are one person yet in some instances the wife is a distinct inferior personality—or complex, we might say. A husband may will land to his wife because a conveyance to the wife in this manner cannot take effect until the oneness is destroyed by death; but a wife cannot will land to her husband because "at the time of making the devise she is under his coercion," or in other words, just himself. And although the husband is one person with his wife and therefore incapable of covenanting with her because he cannot covenant with himself, he could, under the old law whip his wife (moderately) without feeling it by whipping himself. But this incomprehensible oneness didn't let the husband by with feeding and clothing only himself, for under the Common Law the husband was required "to provide his wife with necessaries."

But when the wife crept into the existence of the husband she took along all her debts and the husband had to pay them; but even then he might do so with the wife's money because when they became one, the husband was the *only* one concerning the wife's property. But there was no oneness as to death; when the husband's "time came" the wife stayed right on, if she cared to (and most of them did) and got

one-third of the husband's estate; and she does so yet, even if she has killed him or helped to do so. The Supreme Court of North Carolina declared this in Owens v. Owens, 100 N. C., 240, decided in 1888. There it was held that a woman who had been convicted as accessory before the fact to her husband's murder and was serving a life sentence therefor in the State's Prison, was entitled to her dower. "Forfeitures of property for crime are unknown to our law," says Chief Justice Smith in that case, and only marital infidelity can deprive the wife of her dower."

If the husband dies and has made a will, the wife may relinquish her dower and accept devises made to her in the will or she may disregard the will and take one-third of the husband's estate by relinquishing her benefits under the will.

In 1868 the Constitution of North Carolina partially untied its women and the Legislature has since completed the job and given them in many respects "the whip hand" along with the ballot and billet. She is now a veritable "Human It"—the most dominant, dynamic, compelling and, as ever, uncertain and peculiar factor in our political, social and domestic life.

In North Carolina, since the Constitution of 1868, "a wife is a wife, not a husband, as she was formerly" to quote Chief Justice Bleckley, who further observes in a Georgia decision: "Legislative chemistry has analyzed the conjugal unit and it is no longer treated as an element, but as a compound. A husband can make a gift to his wife, although she lives in the house with him and attends to her household duties, as easily as he can make a present to his neighbor's wife. This puts her on equality with other ladies and looks like progress."

Prior to this progressive provision of the organic law of North Carolina the property of a woman became the property of her husband upon marriage. The Constitution of 1868 gave her the right to retain her property after marriage, and soon thereafter the Legislature of North Carolina empowered her to bring suit against her husband to enforce any right of hers against him, and in 1911 further legislative enactment gave a wife the right to make contracts as if married. Chapter 13, N. C. Laws 1913, as construed by the Supreme Court in Crowell v. Crowell, 180 N. C., 516, gives a married woman the right to recover damages for any personal injury inflicted on her by her husband.

This briefly summarizes the legal emancipation of the women of North Carolina, "and never again," said Chief Justice Clark "will 'the sun go back ten degrees on the dial of Ahaz.' (Isaiah 38:8.)"

HUSBAND NO LONGER SWAYS THE SWITCH.

Till 1874 the judicial history of North Carolina had been smudged by the Common-Law rule which permitted a husband to chastise his wife. It seems that the instrument of correction was standardized by the following special verdict found by a jury in Wilkes County, North Carolina, 58 years ago (State v. Rhodes, 61 N. C., 453): "We find that the defendant struck his wife three licks with a switch not as large as a man's thumb without any provocation except some words uttered by her and not recollected by the witness." The trial judge held "that the defendant had a right to whip his wife with a switch no larger than his thumb" and that upon the facts found he was not guilty. On appeal this

ruling was sustained by the Supreme Court, but Justice Reade, in delivering the opinion, said: "Our conclusion is that family government is recognized by law as being as complete in itself as the State government is complete in itself, and yet subordinate to it; and that we will not interfere with it or attempt to control it in favor of either husband or wife, unless some permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable. However great are the evils of ill temper, quarrels and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain and exposing to public curiosity and criticism the nursery and bed chamber. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. It will be observed that the ground upon which we have put this decision, is not that the husband has the right to whip his wife much or little; but that we will not interfere with family government in trifling cases. We will no more interfere where the husband whips the wife than where the wife whips the husband; and yet we would hardly be supposed to hold that a wife has a right to whip her husband. We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."

What was intimated by Judge Reade in the Rhodes case was affirmatively declared nine years later, by Judge Settle in the Oliver case (70 N. C., 61). Referring to the husband's right to chastise the wife, he said, "We have advanced from that barbarism." But he adds, following Judge Reade's

theory of the sanctity of the home, "From motives of public policy, in order to preserve the sanctity of the domestic circle, the courts will not listen to trivial complaints; if no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze and leave them to forgive and forget."

THE DUCKING STOOL.

For many years after she entered the partnership of states, North Carolina was sparsely settled. Our reported cases show no indictments against common scolds. Doubtless there were not enough people in the State to be disturbed. The Common-Law treatment for public quarreling and "ballahooing" was a certain cooling and exhilarating process administered by a device known as "the ducking stool." It was a seat or chair attached to the end of a long pole which extended over a body of water and worked on a pivot. It seems that for some reason women held an exclusive monopoly in this judicial treatment. A perhaps fair, but unwinne woman, having been adjudged guilty of incessant public vituperation, was strapped in the chair which was then turned over the water and the land end of the pole was raised and lowered until it was deemed that the occupant of the chair had been duly dipped and ducked.

It cannot be surmised that this treatment met with any appreciable degree of success. "Mad as a wet hen" is axiomatic and even Holy Scripture declares (James 3:7, 8) "For of every kind of beasts, and of birds and of serpents, and of things in the sea, is tamed of mankind; but the tongue can no man tame."

In 1819 on trial of several common scolds in New York in the Court of General Sessions for the City of New York, it was said in a foot note "Shall it be that a common disturber of the public peace, a turbulent and abusive woman clamorous in and out of doors at all times, is not to be restrained by the strong arm of public justice? The only objection we have ever heard against a prosecution for this offense is, that at Common Law the punishment is the ducking stool; and it is said that according to our Constitution 'no cruel or unusual punishments are to be inflicted.' But have not our courts the power, on a conviction for a misdemeanor, to soften the punishment, or to substitute one adapted to the nature of our government? The descendants of the peaceful William Penn have so thought and so decided, for we understand that the records of criminal jurisprudence in Philadelphia show that a prosecution for this offense has been sustained and on conviction the defendant has been punished as for any other misdemeanor." City Hall Records, vol. 4, p. 175.

A common scold is still liable to indictment in North Carolina as a public nuisance, but on a conviction of that offense the ducking stool would not be called into requisition—no not even in the hottest weather.

Chapter XXVI.

MOTHER.

A MOTHER'S queenhood is fraught with opportunities for power and everlasting good which transcend any female "career" in the social, professional or political world. Not "the hand that rocks the cradle," but the mind—the mother mind—that directs, corrects, teaches and trains, "rules the world!" Motherhood, even through the ages of woman's thralldom, inspired reverence and superb devotion. It is now and ever has been, the greatest power wielded over the human race—"towering o'er the wrecks of time."

"The story of the fair haired wife of Spartan's king,

> 'Whose face launched a thousand ships
> And sacked the topmost towers of Troy'

as told by the blind bard, still moves the hearts of men, after the lapse of thirty centuries, in proof of the might, majesty and power of the beauty that is woman; but there is greater power in mother love, which dares to do and does all for her children—a love which knows neither time nor place nor limit. The human heart is like an Æolian harp, tuned and trembling to the touch of every wind that whispers by, making music sad or sweet, as the breeze shall blow. Women and children are the great heart of the world. Without them there can be no future."*

"What we owe to the great men of the world we owe primarily to their mothers. The history of the human race

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*Chief Justice Clark in Miller v. Bank, 176 N. C., 158.

is twined like a garland around the hearthstones of humanity. Unfortunately we know too little of the great mothers of the world. Like the violet they blossom in secret places and, as the whereabouts of the shrinking flower is often disclosed only by the fragrance it exhales upon the passing breeze, so do we often discover these modest women only by the perfume of those good works which have gone forth from a secluded home, to scatter sweetness and light along the ways of life and breathe a benediction to the world. Hovering along the sky-line of the world's events, like the fleecy, gold-tipped clouds that mingle their radiance with the splendors of departing day, now floating into view, now fading into night, are these great mother-spirits of the world; always distant, beautiful, retreating, vanishing. The mother-spirit! always, everywhere and forever hallowed by the touch of baby fingers and crooning the lullaby that sweetens life, sanctifies the heart and makes for human kind a home. Here sits woman upon her proper throne, ennobled and dignified beyond the power of political caprice or governmental whim; place her upon the hustings, and she becomes the buffoon's gibe and the scoffer's jest."*

"The sculptured walls rang with sentiment and song. The lady of each knightly heart was pledged by name and many a syllable significant of loveliness had been uttered, until it came St. Leon's turn, when, lifting the sparkling cup—

> 'I drink to one,' he said,
> 'Whose image may ne'er depart,
> Deep-graven on a grateful heart,
> Till memory is dead.

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*Thomas Speed Mosby, in "Causes and Cures of Crime."

To one whose love for me shall last
When lighter passions shall have passed,
  So holy 'tis, and true:
To one whose love hath longer dwelt,
More deeply fixed, more keenly felt,
Than any pledged by you!'

Each guest upstarted at the word,
And laid a hand upon his sword,
  With fiery, flashing eye;
And Stanley said: 'We crave the name.
Proud Knight, of this most peerless dame,
Whose love you count so high.'

St. Leon paused, as if he would
Not breathe her name in careless mood
  Thus lightly to another;
Then bent his noble head, as though
To give that name the reverence due,
  And gently said. 'My Mother.'"

Chapter XXVII.

CAPITAL PUNISHMENT.

CANNIBALISM AND THE "PLANK CASE."

MANY persons are personally opposed to capital punishment, and every person is opposed to being personally exposed to capital or even corporal punishment. And thus is society constantly engaged in defensive warfare. Yet, society is callous to death; it constantly courts, tempts, and inflicts death in pursuit of adventure and joy, but fondles a fuddled sentiment against the State's infliction of death to preserve society by protecting life.

The State, like the individual, has the inalienable right to self-defense, a right which it cannot surrender without surrendering its existence, and a right which man, as an individual, cannot surrender without violating the law of life. Yet, man, as an individual, may forfeit the right to live by making that right derogatory to the State's right to self-defense. If one may justly forfeit his life by merely attempting to commit murder and forfeit it even at the hands of a bystander who has not been assailed and who incurs no danger from the murderous attempt, how much more does the assailant forfeit his life when he actually succeeds in his attempt?

IS IT THE DUTY OR THE RIGHT OF THE STATE TO INFLICT CAPITAL PUNISHMENT?

Respecting not the expediency of capital punishment, but the right of the State to inflict capital punishment on one who commits the most overt act of destruction against the

State, if an individual is justified in taking the life of one who is attempting to commit murder, how much greater right has the sovereign State, in administering justice and in defending society, to take the life of one who actually commits murder? In one instance an innocent life is spared and in both instances a guilty life is destroyed. In one instance death is inflicted as a preventive, in the other as a penalizing deterrent. Can it be that death is a just penalty for an attempt to commit murder and is an unjust penalty for the commission of murder? Is it logical to sanction death as a preventive of murder and declare it barbarous as a penalty for committing murder? Must we concede the individual's right to inflict capital punishment to *prevent* the murder of a single individual and deny the sovereign's right to inflict capital punishment for *committing* murder or deny the sovereign's right to inflict capital punishment to prevent murder as respects the entire community?

"The only true and natural foundations of society are the wants and fears of individuals," says Blackstone. The paramount wants of individuals are the preservation of life and security of home. Therefore, society, representing individuals, creates an all-powerful sovereign protector—the State. The sovereign ordains that a menace to these imperative and paramount wants or needs of society shall not be merely restrained or fostered, but shall be destroyed; that one who wars against these shall suffer death. If this power to resist actual warfare by destroying an internal foe is not with the sovereign State, whence comes the power of the State to order a man to leave his family and home and, if necessary, to sacrifice his life to repel an external invading foe?

It has been seriously urged that "the death penalty is wrong because the State has no right to take what it cannot give; that the State cannot give life, therefore the State should not take life." This is really a strong argument in support of capital punishment. The fact that the State cannot *give* life is the very reason it should *protect* life, and the best way to protect anything is to remove every agency which seeks its destruction. A man who wilfully and wrongfully destroys one of his fellows is at once a menace to society. Have we reason to suppose that he will not destroy ten, twenty, fifty, or any number of lives which his motive requires or his opportunities afford? Does not one who thus wars against society forfeit his right to live, because his life is derogatory to the State's (society's) right to self-defense?

Again, it has been argued: "Capital punishment is opposed to the moral law, 'Vengeance is mine; I will repay, saith the Lord.'" Aside from the fact that repaying a personal wrong is altogether different from satisfying divine justice, under a well-established rule of evidence every one who denies the justice of capital punishment is precluded from offering testimony from the Scriptures in support of that position, because one may not discredit or impeach his own witness, and whoever denies the justice of capital punishment must first impeach and does necessarily discredit Scriptural testimony, especially Genesis 9:6, 'Whoso sheddeth man's blood, *by man* shall his blood be shed," and Exodus 21:12, "He that smiteth a man, so that he die, shall be surely put to death." So, how can one who disputes the justice of these pronouncements, one claimed by Scripture to have been delivered to Noah, upon the very restarting of the human race and the other by Jehovah to Moses as a precept for the Israelites in

the Land of Palestine, urge another pronouncement also imputed by Scripture to St. Paul in his epistle to the Romans?

In gratifying anger, vengeance is employed by the individual, representing only himself, to *retaliate* for a *private* wrong; in administering justice, capital punishment is inflicted by the State, representing society at large, to *requite* a *public* wrong. Justice is a divine attribute, aspired to and invoked by the State; vengeance is an evil human trait, sought to be indulged in by man, but forbidden; the entire stanza reads, "Avenge not yourselves, but, rather, give place unto wrath; for it is written, Vengeance is mine; I will repay, saith the Lord." "Avenge not yourselves," leave it to the Lord, vengeance is His—not yours; He "will repay." This is consonant with Romans 13:1, "Let every soul be subject to the higher powers. For there is no power but of God: the powers that be are ordained of God." Then follows, "Wherefore ye must needs be *subject* not only for" (respecting) "wrath, but also for conscience sake." And the Apostle then goes on to summarize the Ten Commandments as the law to which he admonishes all to be "subject." This prohibitory, recommendatory, and mandatory law provides, "Thou shalt not kill," the penalty for which act has already been provided for by Jehovah. "Whoso sheddeth man's blood, *by man* shall his blood be shed"; and, "He that smiteth a man so that he die shall be surely put to death."

It is absurd to argue that the Commandment, "Thou shalt not kill," implies anything more than a prohibition against homicide—unlawful homicide—for the two pronouncements create an unlawful killing and a lawful killing, one calling for the other. Jehovah Himself will avenge every personal

grievance. A personal grievance is necessarily a public grievance when it involves a violation of the law. The law is supreme, and it is the province of the law alone in administering justice to requite a wrong. Therefore, Paul says, "Avenge not yourselves, but, rather, give place to wrath, for it is written: Vengeance is mine; I will repay, saith the Lord."

In "The Sermon on the Mount," Jesus expressly declares His allegiance to the law, stating that it is His mission to "fulfill," meet, and perform the law; not to contest it. "Think not that I am come to destroy the law" (or to destroy) "the prophets; I am not come to destroy, but to fulfill." Then, in entire consonance with the Commandment, "Thou shalt not kill," He admonishes, as a rule of civil conduct, "Resist not evil," "Love your enemies," "Bless them that curse you," "Do good to them that hate you," "Pray for them which despitefully use you and persecute you."

DOES PUNISHMENT DETER CRIME?

If capital punishment does not deter crime, then is our labor in vain and all penal laws are of no avail? If fear of capital punishment does not deter crime, why inflict corporal punishment? If it is unreasonable to suppose that certainty of taking a man's life will not deter him, why is it at all reasonable to suppose that merely circumscribing his life will deter him? And where do we go from here? Because felonies and misdemeanors continue, notwithstanding the infliction of penalties, must we abolish the criminal code? Because sickness and death continue, must we discard the practice of medicine, even Christian Science and surgery?

To make a penalty effectual, its severity must be coupled with certainty of and speed in its infliction. Stern old England inflicts capital punishment without quibble or delay. It has been shown by criminal statistics that the murders committed in either Chicago or New York during a given period far exceed the murders committed during a similar period in all the British Isles, which, of course, includes London, with its teeming millions.

REFORMING CRIMINALS.

Whence the fallacy that in administering the criminal law it is the purpose of the State to reform the criminal? Law is a rule of conduct, a rule of action, "prescribing what is right and prohibiting what is wrong." Reformation implies readjusting, remaking, re-forming. A penalty is inflicted primarily to punish—to punish the criminal, not to remake or re-form him; to punish for a violation of the law, for an act already committed. The State exercises through other agencies than the criminal law its benevolent plans of reformation. No mandatory law is adequate without its penalty. It is futile to command obedience and not punish disobedience.

But respecting reformation. Prison welfare should subserve public welfare. The criminal is imprisoned primarily for the welfare of society and secondarily for the welfare of the criminal. More earnest consideration for and sane and prayerful devotion by parents to plastic juvenile humanity would minimize the State's job of treating hardened and pernicious humanity; in fact, if this were done there would be less of the latter. If you don't train and bridlewise the colt, you may never break the horse.

Thomas Speed Mosby, in "Causes and Cures of Crimes," seems to likewise opine. Says this eminent criminologist: "The conviction is yearly growing stronger among students of crime and its causes that, in order to check the growth of criminality, we must begin with the children. The juvenile courts are daily confirming this theory in every American State. Rev. James Donahue, of St. Paul, Minn., after an exhaustive study of conditions in his city in 1912, declared that juvenile delinquency is due to the following domestic conditions: Death of father or mother, mental deficiency of father or mother, desertion, divorce, constant quarreling, loss of religious faith on part of parents and consequent lack of religious training of children; intemperance, laziness, love of pleasure, especially craze for theatre-going, bad housekeeping, and general immorality. Some of these factors in the genesis of crime will not be accepted as vital or controlling, but that bad home environment and lack of moral and industrial training are chief among the destroyers of children, none will deny."

It is, of course, unreasonable to suppose that punishment will exterminate crime. It is equally unreasonable to assume that punishment, impartially, certainly, and speedily administered, will not deter crime.

Perhaps it is true that crime is entirely due to human depravity and that human depravity is a species of insanity. Nevertheless, human depravity, which is the result of the victim's sinful self-indulgence, should not render him less amenable to the law.

Mankind is not yet prepared for the abolition of penal laws, and certainly not for the abolition of capital punishment—the harshest penalty for the most heinous crimes.

Every law which governs the universe, from the minutest iota of dust that floats on the breeze to the most gigantic body that courses through the eternity of space; every law which governs the life and movements of man, from the time he crawls in infancy from his mother's arms till he totters in imbecility to his grave, has its penalty.

There will be the millennium dawn and the abolition of all penal and remedial laws only when man universally and entirely regards the divine precept, "Whatsoever ye would that men should do unto you, do ye even so to them, for this is the law and the prophets." And only then, when sways the scepter of peace, "They shall not hurt nor destroy . . . for the earth shall be full of the knowledge of the Lord as the waters cover the sea."

THE PLANK CASE—IS IT EVER JUSTIFIABLE TO TAKE THE LIFE OF AN INNOCENT PERSON TO SAVE ONE'S OWN LIFE?

Blackstone quotes a dictum from Lord Bacon that "where two persons being shipwrecked and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned, he who thus preserves his own life at the expense of another man's is excusable through unavoidable necessity, and the principle of self-defense."

This is overruled in Queen v. Dudley and Stephens, an English case, reported in 14 Q. B. Division, 273. According to that case the law justifies one in taking the life of another in actual defense of his own life, but it does not permit one to take the life of an innocent person to provide a remedy for saving his own life. The defendants in the case cited and two other persons (one a boy 17 years old) were the survivors

of the crew of an English yacht which was cast away in a storm in July, 1884, more than a thousand miles off the Cape of Good Hope. When the survivors had been in a small boat ten days without food or water, the defendants killed the boy and his body was eaten by the three men. It was held that the defendants were guilty of murder, although the act was committed to escape death from hunger. In delivering the opinion, Lord Chief Justice Coleridge says: "To preserve one's life is, generally speaking, a duty, but it may be the plainest and highest duty to sacrifice it. . . . War is full of instances in which it is a man's duty not to live but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of sailors to women and children . . . impose on men the moral necessity not of preservation, but of the sacrifice of their lives for others. . . . It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life."

Burnham's Leadings In Law, section 1152 (a rare publication), cites the decision of a Russian court, which is directly opposed to the English decision. The author does not give the name of the decision—perhaps for lack of space, considering Russian names—but in the light of recent and present events in that unhappy country, it sounds plausible. The statement is in effect that in 1877 a Russian peasant, riding with his wife and four children, were overtaken by wolves. The wolves surrounded the sleigh and the father threw one of his children into their midst. The child was quickly devoured and the wolves still pursued and the parents sacrificed all the children to escape death themselves. They were tried for murder and were acquitted.

Chapter XXVIII.

When the Judiciary Ran Down in North Carolina.

GUMMED by federal lubricants and hampered by military obstructions, North Carolina's judicial machinery began to slow down in January, 1869, and in 1870 it temporarily stopped as a function of civil liberty. The Federal Government had been engaged about five years in the self-assumed task of undoing what it said the seceding states had not done and could not do.

"Papers touching the arrest of Henderson Adams, January term, 1869," show the incipiency of the attempt to impair the judicial machinery of North Carolina. This old record states that when the Supreme Court attempted to convene on the first Monday in January, 1869, the court room was occupied by one Ashley, Superintendent of Public Instruction; that the books of the Supreme Court library had been removed and new fixtures erected on which were piled school books. That the Supreme Court clerk's office was occupied by one Adams, State Auditor, and that all the records and papers of the Court had been removed. A former janitor of the capitol told me that the court records had been dumped, helter skelter, in the rotunda of the building.

The court peremptorily ordered the Superintendent of Public Instruction and the Auditor to vacate the rooms and these persons refused to obey the order of the court. The record states that the justices were permitted by Ashley, "under protest, and not waiving any of his rights," to enter the room and open court; and the clerk of the court was allowed to use a table in the room formerly occupied by the

clerk but then held by Adams, the State Auditor. The justices undertook to hear arguments from day to day in the court room, "restricted by the presence and pretensions of Ashley" who it appeared, conducted the routine business of his office, without regard for the proceedings of the court. The court held evening sessions for consultation in "another room."

The two rooms which were then the subject of dispute are the rooms now occupied by the Secretary of State. They had been assigned to the use of the Supreme Court and the clerk by an act of the Legislature in 1842. Just prior to 1869 the Legislature passed a resolution directing "the committee on public buildings to furnish a convenient room in the capitol building for the use of the Superintendent of Public Instruction." By virtue of this resolution, the Superintendent of Public Instruction and the Auditor undertook to dispossess the court during its recess.

It appears that a few days after this collision in officialdom the General Assembly repealed the resolution providing rooms in the capitol for the Superintendent of Public Instruction, whereupon the Superintendent vacated the court room, but that Adams, the Auditor, refused to vacate the clerk's office. Adams was called before the court on February 5th and ordered to give the clerk of the Supreme Court (Maj. W. H. Bagley) entire possession of his office. Adams merely replied that "he would do so as soon as he was supplied with another convenient room." On February 8th Adams was again called before the court and was told that unless he vacated by the next day, he would be attached for contempt of court. He still disregarded the court and was committed for contempt to the custody of the Marshal, D. A. Wicker.

GOVERNOR INTERFERES WITH COURT.

The Marshal was on his way to jail with Adams, the State Auditor, and as they passed the office of the Governor, Adams requested the Marshal to permit him to see the Governor. The Marshal went into the executive office with the prisoner and, as the Marshal recites in his affidavit, "The Governor said that the prisoner should not go to jail; that a number of persons were present who aided and encouraged the Governor and your affiant being alone and unassisted was unable to take the prisoner to jail by reason of resistance and superior force."

A rule was then served on the Marshal by the clerk of the Supreme Court to appear before the court and show cause why he should not be attached for contempt in refusing to obey the order of the court. Wicker, the Marshal, filed an affidavit which the court decreed "purged him of the contempt," but the record recites that on February 5 the court sent a written protest to the Governor and received the following from him on the same day:

"To the Honorable R. M. Pearson, Chief Justice of the Supreme Court of N. C.

"Sir: I have the honor to receive yours of this date, enclosing a copy from the records of the Supreme Court of an affidavit in the matter of D. A. Wicker, from which the court might well infer that I claim for the executive the power to interfere otherwise than by the exercise of the pardoning power, with the execution of process of the court. I believe that the affiant will explain what seems to have been a misapprehension of the transaction to which he al-

ludes. But however that may be I have the honor to say that I disclaim all such power on the part of the executive. I reciprocate the desire to maintain the comity so happily existing between the departments and I appreciate the spirit and purpose of your communication. I offer assurances of my high consideration for the court, and of my kind regards for yourself. I have the honor to be with much respect, your obt. servant,

W. W. Holden, *Governor.*"

Aside from Wicker's affidavit, neither the record nor (as is shown) the Governor's letter disclose whether the Governor actually prevented the Marshal from placing the Auditor in jail; but Wicker, the Marshal amended his affidavit the same day as follows: "This affiant desires to modify so much of his affidavit as might be construed as putting the Executive and the Judiciary in hostility." Since the sum and substance of the affidavit was that the Governor had actually prevented the Marshal from obeying the order of the court, the Marshal's amendment may be regarded as a retraction. Almost concurrent with the Governor's letter came a communication from Auditor Adams announcing that he had vacated the clerk's office and disavowing any intent to show contempt for the court. Over the protests of Chief Justice Pearson and Justice Reade, the court held that the letter of Adams and his vacating the clerk's office purged him of contempt.

The Chief Executive of North Carolina under so-called "reconstruction" was a journalistic genius, a man of high culture and talented versatility. Through "That sin by which the Angels fell," he became estranged from his own people, or rather, as was contended, he became prominently

identified with those who were against his own people and whether justly or unjustly, his people never forgave him. His descendants inherited his great gifts and a poem ("Hatteras") written by one of his brilliant sons, was included by Longfellow in his collection of American poems of the highest order. Any public wrongs committed by the Governor are not extenuated (though perhaps they should be accentuated) by notable evils equally as great, which were committed by others during those frenzied times, but which went unpunished.

Seeking to conciliate states who were reluctant to adopt the Federal Constitution for fear that their sovereign rights would be abridged, Alexander Hamilton, a renowned Federalist, said: "The States can never lose their powers till the whole people of America are robbed of their liberties."

This dire contingency and its result seemed imminent. Dissolution of the partnership of States had necessarily resulted from violations, by dominant entities, of vital provisions of the compact. The *agent,* created by the compact, had been exalted to a supreme *principal.* This was followed by a flagrant disregard of Section 4, Article IV of the Constitution by which each partner reserved the discretionary power to determine for itself when it was necessary to invoke the aid to the agent to protect a partner against domestic violence. Then followed the declaration by the Chief Justice of North Carolina, "The power of the judiciary is exhausted: the responsibility must rest on the executive."

The final clash between the Executive and the Judiciary in North Carolina occurred in July, 1870. The Governor had proclaimed that Alamance, Caswell and other counties were in a "state of insurrection" and had placed them under mili-

tary rule, with Col. Kirk, a "carpet bag" soldier, in command. It was contended that the real conditions in those counties did not warrant the Governor's proclamation and certain prominent citizens of Caswell County whom Kirk had imprisoned, petitioned Chief Justice Pearson for a writ of *habeas corpus,* alleging that they were unjustly and illegally detained by Kirk. The writ of *habeas corpus* originated during the reign of Charles II (1641). It is founded on the principle "that no one shall be deprived of life, liberty or property but by the law of the land." A writ of *habeas corpus* has the effect of bringing a prisoner before some judge whose province it is to determine whether the prisoner is legally detained. Chief Justice Pearson issued the writ directing Col. Kirk to deliver the prisoners to the Marshal of the court that the Chief Justice might inquire into the lawfulness of their imprisonment. Kirk refused to regard the writ and was sustained by the Governor who claimed to hold the prisoners under military discipline. After hearing full arguments from counsel on the question whether Kirk had a reasonable excuse for not obeying the writ; whether conditions in certain counties justified subjecting them to military occupation and suspending the writ of *habeas corpus,* and if so, should the writ be directed to the Governor, the Chief Justice held, in his famous opinion, that although the writ of *habeas corpus* had not been suspended, the Chief Justice was powerless to enforce it and concluded, "I have discharged my duty; the power of the judiciary is exhausted. The responsibility must rest on the executive." Dr. Hamilton says in his book "Reconstruction in North Carolina," that this opinion so nearly resulted in the impeachment of the Chief Justice that he employed Thos. C. Fuller

to defend him. It remained for a Federal Judge, though a native and resident of Pasquotank County, North Carolina, Geo. W. Brooks, to restore civil liberty to North Carolina. A writ of *habeas corpus* from him resulted in the release of the prisoners.

And so surged, seethed and receded the tidal wave of Federal aggression.

> "Sail on, sail on, O Ship of State;
> Sail on, O Union strong and great."

But may God spare the "Ship of State," for

> "Our hearts, our hopes are all with thee;
> Our hearts, our hopes, our prayers, our tears,
> Our faith triumphant o'er our fears
> Are all with thee, are all with thee."

WAYSIDE TALES FROM CAROLINA

Wayside Tales from Carolina

Chapter I.

HISTORIC MEETING OF TWO LONELY HORSEMEN. LAW'S STORE IN NEW-LIGHT TOWNSHIP. A NEGRO WHO PREPARED WHITE YOUTHS FOR COLLEGE.

FICTION has drossed early modes of travel—merged its privations into golden memories and legends of fascinating adventure. A magic spell still lingers with even abandoned highways of the stagecoach and the wagon and pony express. Poetic fancy makes "some haunting presence" brood o'er dilapidated farms; makes "ghosts of dead homes" stare through broken panes, or at twilight drive "spectral kine" along shadowy lanes to leaning barns.

But many old highways suggest stark human happenings which need no coloring of prose or poetic fancifulness. In waning winter, 109 years ago, there was the apparently trifling coincidence of two horsemen meeting in a lonely canebrake to water their steeds at Pigeon House Branch, two miles north of Raleigh. Today this spot typifies transitions of a century; a hard surface highway spans the branch; near by is a service station for automobiles, and overhead two railroads cross. Above are telephone and telegraph wires, and in dim heights there sometimes sail ships of the air. There is the incessant mingling of noises from passing trains and auto cars; strangers in cars going north and in cars going south meet and pass without word or sign of greeting.

The loneliness of the traveling horsemen who met there 109 years ago begat companionship. Conversation revealed

that one horseman was going south with news to General Jackson that peace had been declared between England and the United States and that the other horseman was going north with news from Jackson of the victory at New Orleans. The surprising items of news interchanged were more than a month old and the time taken in telling would now suffice to proclaim them to the world.

* * * * *

Here is a place of memories—the scene of past and present incompatibilities. Long stretches of forests have broken, and here is a lonely hill crowned by a solitary house, store and dwelling combined—"Law's Store" in Newlight Township. What a name in a misnamed place! Newlight—Wake County's darkest corner, named doubtless in derision even a century ago, and the name still a mockery. During a blustery March night in 1921, disgruntled concocters of ardent spirits in Newlight, seeking to stab civilization, fired two schoolhouses and a church and razed them to the ground. "Sunrise Schoolhouse," in an adjoining district, was spared.

Ruralism, even as cosmopolitanism, must have its slums, and it sometimes seems that the slums of the country compare favorably with the slums of the city. However, in lawless, benighted Newlight once lived a man named Law, and here stands his store. But, stranger still, a few miles away, eighty-two years ago, stood the schoolhouse of John Chavis, who was, without any exception, the most remarkable black man who ever lived in the United States. A Southern school of a black tutor of white pupils! A school patronized by many of the most distinguished white men of North Carolina, notably Chief Justice Henderson of the Supreme Court bench. Some of its pupils afterward became

renowned ministers of the gospel, one a United States Senator, one a Governor of North Carolina, and others became lawyers, teachers and eminent politicians; some of the pupils actually boarded in the home of their negro teacher. And the negro teacher—friend and companion of the cultured and élite of the "Old South"; a man of such influence, tact and diplomacy as to actually intervene and prevent a duel between two political leaders, one of whom was Governor of North Carolina and the other afterward became a United States Senator and was a promising candidate for President of the United States. The truth of it all is substantiated by Government documents of the Bureau of Education and authentic contemporaneous history.

The late A. B. Andrews, vice-president of the Southern Railway Company, said (according to his son, William J. Andrews) it was old current report that the career of John Chavis was the result of a wager that a negro could not be educated. This is partly substantiated by Dr. Charles Lee Smith, of Raleigh, who states in "The Story of Education in North Carolina" (Bureau of Education C. I., No. 2), page 139, that Chavis "studied at Princeton as a private pupil of Dr. Witherspoon, to whom, it is said, he was sent to see if a negro were capable of receiving a collegiate education." And Dr. Smith adds: "His career in after life leaves no doubt as to the success of the experiment." Chavis was prominent in Granville, Orange and Wake counties as a preacher of the gospel and as an educator from 1805 till his death, about 1840.

This isolated spot, Law's Store, is also associated with the event which closed the career of Chavis as a minister of the

gospel. It was here that a courier, speeding from Virginia with an official bulletin announcing the Nat Turner insurrection, stopped to change horses and give the tragic news. The Turner insurrection was an uprising of the slaves in Southampton County, Va., led by a slave named Nat Turner, who in 1831, during an eclipse of the sun, began his bloody enterprise by killing five members of his master's family, and, being joined later by other slaves, continued the massacre from plantation to plantation, sparing neither age nor sex, until fifty-six white people had been murdered. Rumors that there would be a general insurrection by the slaves in Virginia and North Carolina seemed to justify the Virginia authorities in sending couriers throughout Virginia and into North Carolina to announce at every tavern, store, town and village the horrible event and to give warning of further trouble.

Each courier carried a written official statement of the massacre, which contained a request that all possible aid by the change of horses, food and shelter be rendered the courier. Dr. Leroy Chappel, an old medical practitioner of local reputation, who died about twenty-five years ago, was a clerk at Law's Store, and was present when the courier dashed up, stood in his stirrups and read the proclamation, changed horses and sped away in the twilight along the route of the old horse express which, it is told, then operated by relays between Washington and New Orleans.

In consequence of this insurrection, all negro preachers were silenced in North Carolina by legislative enactment in 1832, and were heard again only after the horrors of an infinitely greater strife between the superior races.

The most authentic record of John Chavis was written by Dr. Charles Lee Smith. This is contained in a document prepared by Dr. Smith, entitled, "The Story of Education in North Carolina," and published by the National Bureau of Education in 1888. Dr. Smith says, "The life of Chavis finds no parallel in the South, nor, as far as the writer is aware, in any part of our country." Chavis was a Presbyterian clergyman and an eminent teacher. He was respected by the higher class of white people, and, in fact, universally, for his demeanor as a gentleman, and was revered for his fervent piety as a Christian. After leaving Princeton, where he studied as a private pupil, he went to Virginia, and after his ordination engaged actively in the work of the ministry in that State. He returned to North Carolina about 1805 and, according to its records, was connected with the North Carolina Orange Presbytery in 1809, being assigned to some special mission and preaching to both white and black congregations. In 1883, George Wortham, an elderly and distinguished North Carolina lawyer, writing of Chavis, states: "I have heard him read and explain the Scriptures to my father's family and slaves repeatedly. His English was remarkably pure, contained no 'negroisms'; his manner was impressive, his explanations clear and concise. His sermons abounded in strong common-sense views and happy illustration, without any effort at oratory or any sensational appeals to the passions of his hearers."

The late Paul C. Cameron, an influential capitalist and sponsor of education, wrote: "In my boyhood life at my father's home I often saw John Chavis, a venerable negro, recognized as a free man and as a clergyman of the Presby-

terian Church. As such he was received by my father, Judge Cameron, and treated with kindness and consideration. He was respected as a man of education, good sense and most estimable character. He was polite—yes, courtly; but it was from the heart and not affectation."

The records of the session of Orange Presbytery, held in Raleigh, April 21, 1832, refer to a letter received from "John Chavis, a free man of color, and a licentiate under the Presbytery, stating his difficulties and embarrassments in consequence of an act passed at the last session of the Legislature forbidding free people of color to preach." The records also recite a resolution relieving John Chavis of further pastoral duties, and it is probable that his active work as an educator of white youths in preparing them for college began about that time, although he conducted a primary school many years earlier for white and colored children. The following appears in a copy of *The Raleigh Register* (an old newspaper), in the archives of the State Library at Raleigh:

John Chavis takes this method of informing his Employers and the Citizens of Raleigh in general that the present Quarter of his School will end the 15th of September, and the next will commence on the 19th. He will, at the same time, open an Evening School for the purpose of instructing Children of Colour, as he intends, for the accommodation of some of his employers, to exclude all Children of Colour from his day school. The Evening School will commence at an hour by sun. When the white children leave the House, those of colour will take their places, and continue until 10 o'clock.

* * * * *

Those who think proper to put their Children under his Care may rely upon the strictest attention being paid, not only to their Education, but to their Morals, which he deems an important part of their Education.

Aug. 23, 1808.

Chavis' high school, conducted exclusively for white pupils, stood in Granville County, near the Wake County line. One of the pupils who attended this school, Charles Manly, afterward became Governor of North Carolina; another, Wiley P. Mangum, became United States Senator; two pupils were sons of Leonard Henderson, Chief Justice of North Carolina, and many of his pupils became prominent politicians, lawyers, preachers, physicians and educators. The father of Professor J. H. Horner, founder of one of the best military schools in North Carolina, attended the school of John Chavis and boarded at his home, according to a statement made by Professor Horner himself.

Colonel Benehan Cameron, of Raleigh, says that, according to information from contemporaries of Chavis who lived on the plantation of his father (Paul C. Cameron, who has just been quoted), John Chavis was a full-blooded negro; that he came from the West Indies to North Carolina during boyhood; that he moved to Mecklenburg County, Va., during his declining years and died and was buried there. He married, but it is not known whether children survived him. Colonel Cameron relates that Senator Wiley P. Mangum, when a member of the Legislature of North Carolina and a candidate for the United States Senate, became engaged in a controversy with Governor John Owen, and the difficulty resulted in a challenge from Governor Owen to Man-

gum to fight a duel. Mangum requested Paul Cameron to act as his second and to arrange details for a meeting. Mr. Cameron, desiring to avoid a tragedy, wisely and adroitly secured Mr. Mangum's promise that management of the affair should be left unreservedly to Mr. Cameron. Mr. Cameron straightway took the negro clergyman into his confidence, and the negro's good sense, tact and diplomacy, wielded without the knowledge of his former pupil, Mr. Mangum, resulted in a withdrawal of the challenge and an amicable adjustment of the quarrel.

And so does this old wayside store, whence all travel long since turned, recall the career of one whose like has never since been seen. A member of a servile race, an elevating factor among its masters; a recognized intellectual equal imparting knowledge of the classics to their sons. A seemingly rare picture of the Old South—a glint from the lustre of its slow but splendid days; evincing a spirit kindred to one which, undeterred by rancorous fanaticism, might have found fruition in the abolition, by at least two Southern States, of human slavery. Verily, the Old South and the New South differ—they differ as "one star differs from another star in glory."

HOME OF THOMAS BLACKNALL, A NEGRO SLAVE OWNER.

Chapter II.

A NEGRO SLAVE OWNER IN THE SOUTH. RESUME OF THE SOUTH'S TREATMENT OF THE NEGRO RACE. A DEAD HOME. AN ENGLISHMAN WHO DRANK NEGRO BLOOD TO MARRY A NEGRO GIRL.

RARE and widely told cases of cruelty have clouded and sullied Southern treatment of negro slaves. No dull tale of hate, but sweet and alluring is the truthful story of master and slave. Not revolting and drear, but strange and sublime is the South's real attitude towards the negro race. What draws lightning fire from stormy skies may cause radiance on a peaceful day. The storm has passed away. Some truths may not now displease but may cause praise and regrets.

Told in its entirety no people's treatment of a servile race has shown a sublimer spirit of liberality and toleration, accompanied by less incentive and one less encouraged and more persistently balked and contravened, than the attitude of the Southern States towards its negro slaves and towards its negro citizens. Indeed it may even be audaciously said that perhaps never in modern times, prior to "reconstruction days," and be it said with true charity and forgiveness, for those were not days of sober thought, that never before the maelstrom in the wake of the War Between the States has one portion of a civilized race, bound by blood and tradition, taken sides against the other portion of that race to subject their fellow-countrymen to demolition by a semi-savage, semi-civilized race.

Why should not Americans gladly proclaim the Southern slave owner as the greatest missionary of modern times,

"lifting the slave to heights of which he had not dreamed in his savage home?" For, upon entering serfdom, a negro slave was a heathen and a vicious savage. The religious propensities of the Southern slave are proverbial, the Southern negro race is notoriously religious; to it atheism and agnosticism are unknown. Vengeance is the most dominant human trait. Why was it dormant when the master of the Southern slave left his family defenseless to contend with Federal armies? What spirit inspired the loyalty of the Southern slave to his mistress and her child? And be it unchidingly said, the imported slaves worked in Southern fields, but the slave-ships sailed from New England ports, that the Northern States sold and the Southern States bought. The North and the South were partners in crime, and why not tell the full, sad truth? But meagerly that is this: Very many Northern people, who wished to abolish slavery in their own States, instead of emancipating their slaves, sold them to Southern planters. So prevalent became this practice throughout the Northern States on the eve of emancipation in the North, that in 1784 North Carolina, realizing the injustice of keeping slaves in serfdom by importing them into States where slavery existed instead of permitting them to remain where they would eventually be freed, forbade by Act of Assembly, such importation of slaves and provided for their return. Thus in 1784 the Legislature of North Carolina resolved that the importation of slaves "is productive of evil consequences and highly impolitic" and laid a tax on the importation of slaves and directed that all slaves brought into North Carolina from any State that had passed an act to liberate slaves were to be immediately returned to such State under heavy penalty

and the number of slaves to be imported from foreign ports were greatly limited.

Apprehension of evil results that might attend emancipation operated to actually restrict the absolute rights of Southern owners to free their slaves. But to remove fears of insurrection incited by propaganda from Northern abolitionists and by free negroes, a society was formed in 1816 to colonize the free negroes, and in the South it was really hoped that this colonization would open a way to general emancipation. Chief among the promoters of this society was Judge Bushrod Washington, of Virginia, its first President, and Henry Clay, an ardent advocate. Although the motives of this society have been severely impugned by Northern historians, it is nevertheless true that its advent was hailed with gratification throughout the Union and that 96 subsidiary local societies were formed, generally in the Southern States. Many were organized in North Carolina. The first colonization settlement actually effected in Africa was named Monrovia, after President Monroe, who rendered the enterprise great assistance.

The public documents of North Carolina, Virginia and other Southern States constantly reiterate and proclaim the fact that the South recognized the ownership of slaves only as a public necessity, but were bitterly opposed to the exploitation of the slave trade. As early as 1774 the freeholders of Rowan County, North Carolina, resolved that "The African slave trade is injurious to this Colony, obstructs the population of it by freemen, prevents manufacturers and other useful immigrants from Europe from settling among us, and occasions an annual increase in the balance of trade against this Colony." This was immedi-

ately followed by a resolution of the first Provincial Convention that "We will not import or purchase any slave brought into this province *from any part of the world* after the first day of November next" (1775). This resolve was strictly observed by the people and enforced by the Committee of Safety.

In 1794 North Carolina prohibited, by legislative enactment, the bringing into that State of any slave or intended servant of color, unless the person bringing such person should take an oath that he was coming to North Carolina to become a citizen of the State and that he was not bringing the servant for sale.

A DEAD HOME

"The cloudy lilacs still o'reach the sagged and creaking gate;
"For dancing feet that come no more the weed-hooked blossoms wait;
"With sinking roof and shattered panes and hearthstone damp and cold,
"The empty house stands in its place, forlorn and gray and old."

* * * * *

"Fled are the hearts that ached, the busy hands that toiled are fled,
"Gone with the dews that summer drank, the leaves that autumn shed."

Stark above a wooded valley, high over nearby riotings of desolation—rank weeds, brambles, distorted shrubbery and matted vines, stand remnants of a once famous homestead, now deserted, dead and forgotten. Here, nearly a century ago, if tradition be trustworthy at all, was a habitat grand in simplicity and omnific of ease, bounty and merriment—the summer residence of Geraldus Toole. To these solacious

ANCIENT SUMMER RESIDENCE OF GERALDUS TOOLE.

heights, with the advent of summer, journeyed the family of Geraldus Toole from the lowlands of Edgecombe County, 60 miles away, and here kept open house and constant welcome until (as was then supposed) the frosts of autumn purified the Eastern clime. 'Tis but trite and drear that with the master's death over 75 summers ago these glad seasons ceased and dancing feet came here no more; that all who reveled here, from life's frail chalice have long since spilled its wine; yet with the dull transcience of those dead days is a strange new story of that long-forgotten past. To tell this story let us burnish up a link in a rusty title chain.

A TRUE TALE FROM AN OLD TITLE DEED

"This indenture made and entered into this the seventh day of October, 1850, by and between Joseph B. Littlejohn and his wife, Mary B., of the first part, and Thomas Blacknall of the other part," is intended to witness the bare fact that Thomas Blacknall paid Twelve Hundred and Seventy-five Dollars to Joseph B. Littlejohn and Mary B. Littlejohn, his wife, and that Thomas Blacknall thereby acquired fee simple title to Three Hundred and Thirty-Three Acres of land in Hayesville Township, Franklin County, North Carolina, which land is specifically identified by metes and bounds. But it witnesseth much more to tell that Joseph B. Littlejohn was a General in the North Carolina Militia, an extensive land and slave-owner and a son-in-law of Geraldus Toole, who owned fourteen thousand acres of land in Edgecombe County, and who was an uncle of Henry Toole Clark, once Governor of North Carolina; that Mary Littlejohn was a great-granddaughter of John King—father of

Methodism in North Carolina; that the land conveyed was the "summer estate" of Geraldus Toole, and that this "summer estate" was bought for Twelve Hundred and Seventy-Five Dollars by Thomas Blacknall, a black negro, a man of affluence and himself an owner of slaves—a deliberate act of bargain and sale of valuable land between the elite of the old South and a negro who owned negroes himself, eleven years before the fateful family feud between sisters of the American Union of States—a feud incited by sisters solicitous for the black man's freedom and the black man's rights. Is it not a story strange and new that seventy-five years ago there lived in Franklin County, North Carolina, a black man who owned nearly one thousand acres of land and five negro slaves, and who was a deacon in a white church and who frequently led white congregations in prayer? Mrs. Sallie E. Mitchell, a relative of Nathaniel Macon, and who lives six miles from Louisburg, distinctly remembers that Thomas Blacknall, a full-blooded negro, frequently led white congregations in prayer, and this is verified by her brother, William M. Best, and other residents of Franklin County.

THOMAS BLACKNALL, THE NEGRO WHO OWNED SLAVES AND BOUGHT LARGE TRACTS OF LAND.

Over one hundred years ago there was born on the Blacknall plantation, five miles south of Oxford, Granville County, North Carolina, as the chattel of John Blacknall, a negro boy, afterwards known as Thomas Blacknall. Tom, as he was familiarly known, became a blacksmith and bell maker of more than local renown. His master permitted him to "buy his time" and to keep his earnings. It is history in

the Blacknall family that Tom was absent from his master's plantation at intervals of a year without intermission and with his master's permission, went as far away as Baltimore, peddling his bells and plying his trade. According to tradition, which is the best history, Tom was the first and only black deacon of a white Southern church. Mrs. Sallie E. Mitchell confidently affirms that Tom was a Presbyterian; that it was in the Presbyterian Church, which she attended as a child, that Tom frequently led the congregation in prayer. Tom's grandson, the Rev. John J. Young, 76 years old, living near Louisburg, believes that Tom was a Baptist. There is good reason to believe that Tom was first admitted, on confession of faith, to communion in the Presbyterian Church, and was afterwards allied with the Baptists; certainly he was a Baptist during his last years, as recalled by John J. Young.

According to John J. Young, grandson of Tom Blacknall, the negro slave-owner, Tom, purchased his freedom for $900.00. It is also said by John J. Young, a negro preacher living near Louisburg, that Tom's master, John Blacknall, solicited trade for Tom that Tom might purchase his freedom. Tom was an expert blacksmith and bell maker; his master was entitled to all that Tom earned, but Tom's master augmented Tom's earnings that Tom might purchase his freedom.

Tom was twice married, first to a negro slave who lived 20 miles away in Franklin County, and whose freedom he also purchased, and second to a free negro named Patsy. He also bought the freedom of four of his sons by his first marriage and took title to them in himself and hence owned them as his slaves. The children born to Tom, after the

freedom of himself and his wife, were, of course, "free born." He bought other slaves, but the number is unknown. His son Bob, whom he held in serfdom, married a free mulatto named Mary Fogg, who was the legitimate child of a full-blooded English soldier in Cornwallis' army. By Tom's will he devised his son Bob to Bob's wife, Mary Fogg.

Mary Fogg's father was a white English soldier. Inquiry as to how Mary Fogg could be the legitimate child of a white Englishman brought out this remarkable story.

AN ENGLISHMAN WHO DRANK A NEGRO'S BLOOD THAT HE MIGHT TAKE HER AS HIS WIFE

Joseph Butler, a member of Cornwallis' army, was severely wounded in the Battle of Guilford Court House, March 15, 1781. In Cornwallis' retreat towards Wilmington, after this battle, Butler became a straggler and was lost from his command. He was succored by a free mulatto woman, who hid him in her home in Granville, or Warren, County (the precise place cannot be identified) until the surrender of the English army in the following October. During Butler's confinement he was faithfully nursed by his benefactress' young daughter, who was nearly white, and there grew between them a mutual attachment. It was Butler's ardent desire to make the young woman his wife, and he was greatly distressed upon realizing that, under the laws of North Carolina, to wed the woman was impossible—she had negro blood in her veins and he was 100 per cent white. He remained at her mother's home in an unfrequented part of the country and faithfully cultivated her small farm—

isolated and ignored, an alien enemy, a fugitive hiding under a negro's roof. For some reason he assumed the name of Joseph Fogg and vainly sought to conceive a plan to thwart the law which forbade him marrying the woman he loved and who had nursed him to life. In those times the "letting of blood," if not regarded as an actual panacea, was at least the *dernier resort* in the treatment of all human ailments. The mulatto girl was, for some unknown physical disorder, bled by a surgeon. Her sympathizing lover witnessed the operation and, to the astonishment of the surgeon, deliberately drank an appreciable quantity of the patient's blood. He was off early the next morning and by nightfall returned with a duly authenticated license to wed his mulatto sweetheart. It developed that he had gone to the proper official, made affidavit that he had negro blood in his veins, and had procured license to marry a half-blooded negro woman.

The subsequent living of Joseph Butler, alias Fogg, is unknown. That he became identified with the negro race with whom he had cast his lot followed as a necessary consequence. It is reasonably certain that his daughter, Mary Fogg, married a negro Bob, the son of Thomas Blacknall, and it is shown by the will of Thomas Blacknall, recorded in the office of Register of Deeds for Franklin County, that on the death of Thomas Blacknall in 1863, Mary Fogg, the legitimate negro daughter of a white English soldier, became the owner of her husband, Bob Blacknall, Bob being bequeathed to her by her father-in-law's will. Prior to emancipation only free negroes in the Southern States had surnames.

For the purpose of identification a negro slave carried the surname of his master. Hence, Bob, the son of Thomas

Blacknall, upon the death of John Blacknall, his owner, was allotted to his young mistress who had married a man named Young and took the name of Young. Bob's new mistress kindly offered to permit Tom Blacknall to buy Bob's freedom, and Bob became his father's slave, but the name Young which he had acquired was, for some reason, unchanged.

A son of Bob Young and Mary Fogg, daughter of the insistent English lover, is Rev. John J. Young, a minister of the colored Baptist Church, who lives near Louisburg, N. C. He is now in his 76th year and he evinces little negroism. He has a brother, Dr. J. Madison Young, who is President of the West Coast Theological Seminary and Bible Training School, Los Angeles, Cal. John J. Young is industrious, genteel, highly respected, unassuming and thoroughly polite. His ready reply to this inquiry, though not responsive, was significant and impressive: "John, you have lived long and witnessed many changes; how has the negro race profited by emancipation and how do old slave owners compare with the present white race?" "Mister, there was better white folks then than there is now."

All of Thomas Blacknall's numerous descendants are notoriously thrifty, law-abiding and highly respected. Many of them are ministers of the gospel and nearly all are land owners. Thomas Blacknall never moved from his humble home. His will devised the Toole estate to his wife, Patsy. Her grandson lived there when he died about three years ago, but since his death the house has been unoccupied and is rapidly falling into decay. Its elegantly hand-carved mantels and mottled interior decoration bespeak of departed grandeur.

The following is a verbatim copy of Thomas Blacknall's will, recorded in 1863:

THE WILL OF A NEGRO SLAVE OWNER.

"I, Thomas Blacknall, of the County of Franklin, and State of North Carolina, being of sound mind and disposing memory, do make and declare this to be my last will and testament; that is to say:

"First. I give and bequeath to my beloved wife, Patsy Blacknall, for and during her life, all my land, or real estate, including my Toole tract of land as well as that on which I reside, also my two negro men Starling and Charles, my household and kitchin furniture, stock of horses (except one hereinafter given to my son Gabriel), cattle, hogs, sheep, poultry, farming utensils to have and to hold during the term of her natural life.

"Second. I give and bequeath to my son Gabriel one horse, to be selected by him, and my blacksmith tools. I also give and bequeath to my said son Gabriel, after the death of my said wife, my negro men Starling and Charles, also two cows and calves, one sow and pigs.

"Third. After the death of my wife Patsy, I give and bequeath to my grandson, Tom Dunce, his heirs and assigns, fifteen acres of land to be laid and allotted to him on the West side of my house tract near Lynch's creek, to be held by the said Tom Dunce as a home for his mother Harriet Dunce, and in trust for that purpose during her life, and after her death to his absolute disposal.

"Fourth. After the death of my wife Patsy, I give and bequeath to my son Gabriel, his heirs and assigns, one-

third part of all the balance of my land not hereinbefore disposed of, and the remaining two-thirds I give and bequeath to my two daughters, Becky and Peggy, for life, to be equally divided between them and after their deaths the shares of each is to go to her children, and after the death of my wife it is my will and desire that all the property given to her for life that may be then on hand and which is not otherwise disposed of by me in this will shall be equally divided between my daughters Becky and Peggy.

"Fifth. I give and bequeath unto Mary Fogg, her heirs and assigns, my negro man Bob.

"Sixth. All the rest and residue of my estate that may not be otherwise disposed of I give and bequeath to my wife Patsy Blacknall."

John H. Hayes is named as executor of the will and the will is dated May 5, 1860.

DUNCE AND DUNSTAN.

The name Dunce appears frequently in the old records of Franklin County. Bearers of the name have since the war changed it to Dunstan, an elongation of Duns. This is a strange coincidence since lexicographers say that the word "dunce," which is now employed to denote a dull, stupid person, is of slang parentage and was derived from Duns Scotus, called "the subtle doctor," who died in 1308 and whose writings and teachings were so much derided that one who adhered to them was scornfully called "a duns," the word being finally corrupted into "dunce."

Chapter III.

THE BIRTHPLACE OF ANDREW JACKSON—NORTH CAROLINA AND SOUTH CAROLINA GRAVEYARDS DISTINGUISHED—A GRUESOME BURIAL—DUEL BETWEEN JACKSON AND DICKINSON—AN INNKEEPER'S DEBT PAID BY A GREAT BATTLE.

FOLLOWING a devious and solitary way very near the northern boundary of South Carolina one comes to an historic burying ground. Rural community cemeteries are somewhat rare in North Carolina, but are common in South Carolina. Ruralists of South Carolina show preference for post-mortem sociability dissimilar to the living exclusiveness of Charlestonians, with their side-front dwellings, high stone walls and doorknob gates. However circumscribed and exclusive their ante-mortem sphere of sociability, ruralists of the Palmetto State, upon attaining death, apparently seek to atone for their proud and vain distinctions—they sleep their last sleep 'midst the commonality of their fellow-men in community burying grounds, with no fence or hedge between —divided in life, united in death.

In North Carolina agriculturists become exclusive only after death; they have their own private graveyards and are proud of them; this pride being modestly evidenced by locating them within the curtilage, either immediately in front of the dwelling-house or on the side in plain view from the public highway. A farmer living near Raleigh has erected four attractive tombstones to his departed wives about fifty feet from the front porch of his dwelling and the same distance from the highway. It seems that these mementoes were erected promptly as the occasion arose, and it is surmised that they gave rare stimulation to the wives as they came in line of departure that their memories would be so obviously cherished.

To many people, especially negroes (in the daytime, however), any cemetery is fascinating. Here is one naturally and peculiarly interesting to every one—even to one who is unacquainted with its history. Waxhaw Cemetery is in Lancaster County, South Carolina, a few miles from the North Carolina line. There was a gruesome burial here on a sleety day in February, 1767. A group of shivering attendants of the funeral had preceded to the burying ground the rough sled which bore the corpse. When the sled arrived the corpse was missing. The pallbearers retraced their journey a considerable distance through the storm and found the coffin in the road, where it had slipped from the sled. It was replaced, and the burial of the father of President Jackson was made during a pouring sleet.

Waxhaw Cemetery, sixty-five years ago, ere rains of a century had beat on its "moss-mottled stones," was described as "a strange and lonely place." Lonely it still is, and even more strange. It has been continuously used as a burying ground for nearly two centuries, and time has wrought sharp contrasts in sepulchral ornamentation and tombstone inscription. Among the earliest to arrive in this "city of surcease" was Mrs. Mary Taylor, who found release September 5, 1758. Rev. William Richardson, who had been pastor of the church which then stood there (one stands there now), was laid to rest near the scene of his labors, July 20, 1771. His nephew, General William Richardson Davie, followed him in 1820, having been a noted Revolutionary soldier and Governor of North Carolina. But exclusiveness is glaringly in evidence even here. A stone wall eight feet high and about six by twelve feet in circumference surrounds one last abode, first occupied one hundred and two years ago, and all concerned

in its erection having long since gathered to remain within its sombre walls. The memorial tablets are built in the wall facing the inside, and there is no entrance to the enclosure save by a flight of steep stone steps, which is built on the side away from the entrance to the cemetery, and the structure from a distance resembles a vault. The grave of President Jackson's father is not marked.

BIRTHPLACE OF PRESIDENT JACKSON.

When the gloom which shrouded our republic during the first thirty-seven days of 1815 had been dispelled and the country was electrified by news of the victory at New Orleans, inquiries were rife—"Who is this Jackson? Where was he born? What State claims him?" To these, 109 years afterward, history replies uncertainly; to many Jackson was ever incomprehensible; to many, even today, the place of his birth is an open question.

The Waxhaw settlement lies within both the Carolinas and was anciently the seat of a tribe of Indians whose name it bears. Within this settlement in Union County, North Carolina, three-quarters of a mile from the South Carolina line, stands a stone monument, about six feet high, bearing the inscription:

HERE WAS BORN, MARCH 15, 1767,
ANDREW JACKSON,
SEVENTH PRESIDENT OF THE
UNITED STATES.
ERECTED BY
NORTH CAROLINA D. A. R., 1910.
THESE STONES WERE PART OF THE
ORIGINAL CABIN.

It seems that South Carolinians within the immediate vicinity persistently refuse to acknowledge the authenticity of this inscription, and even historians differ respecting the birthplace of Andrew Jackson. The highway from North Carolina to the nearest approach to the monument enters South Carolina and leads back into North Carolina. The North Carolina Society of the Daughters of the American Revolution placed a signboard on the roadside where the path to the Jackson monument intersects with the highway, the sign reading, "Andrew Jackson, seventh President of the United States. Birthplace 300 yards east of this place." This sign has been alternately torn down and replaced by rivals for the honor of a Presidential birthplace.

It was in place as the writer turned into the path which leads to the marked site of Jackson's birthplace, but there was a sign farther down the road in South Carolina, I was told, which reads, "Andrew Jackson, seventh President of the United States. Birthplace 100 yards west of this place." Although the place to which this signboard refers is not identified, I was told that it is an old house well within the South Carolina borders, claimed by South Carolinians to be the George McKemey house.

Naturally, North Carolina's greed for glory and South Carolina's contumeliousness breed belligerency; naturally, though unbecomingly, do these doughty daughters and quarrelsome sisters altercate over the motherhood of an exalted son—a son who, save for three weeks of his infantile existence, was cradled, nurtured and reared to young manhood in South Carolina, and yet who, according to North Carolina's contention, first saw light and was first though briefly cradled in North Carolina.

In the dispute as heretofore waged, South Carolina has offered President Jackson's proclamation to the nullifiers of South Carolina, issued in 1832, and closing with, "Fellow-citizens of my native State"; also affirmative statements by Jackson himself that he was born in South Carolina. There the State has rested her case.

North Carolina objects to this evidence on the ground that it is incompetent. That State insists that ignorance respecting time and locality by which every person is handicapped upon entering this world disqualifies him to prove by personal knowledge when or where he was born. These facts he must blindly accept from predecessors, and it is customary to do so without diligent and persistent inquiry. Those who were present when Andrew Jackson was born had a decided advantage over little Andrew in knowledge of his whereabouts—an advantage which it is unreasonable to suppose was subsequently parified. In short, that Andrew Jackson's opinion, which he never knew was questioned, that he was born in South Carolina, cannot under elementary rules of evidence prevail over solemn avowals of persons, who were actually present when he was born, that the place of his nativity was North Carolina. Furthermore, North Carolina assumes that if Jackson were living today he would not presume to urge his personal opinion that he was born in South Carolina against direct evidence that he was born in North Carolina; why, then, should South Carolina vaunt the absurdity?

Recurring to archives in her Hall of History, North Carolina offers the written statements of witnesses who were present when Jackson was born. These statements were pro-

cured by Jackson's biographer, Parton, about 1858, and the evidence adduced from them is substantially as follows:

Andrew Jackson, father of the President; his wife, her two sisters and their husbands emigrated from Ireland to America in 1765. The Jacksons settled in North Carolina, in that part of Mecklenburg County which is now Union County (named to commemorate Jackson's successful attempts against the nullifiers of South Carolina), and less than five miles from the South Carolina line. A sister of Mrs. Jackson, Margaret, who had married George McKemey, also settled in North Carolina, three-quarters of a mile from the South Carolina line; and another sister of Mrs. Jackson, who had married James Crawford, settled seven miles away in South Carolina. It appears doubtful whether the settlers knew or cared to know in which of the two provinces they lived.

Andrew Jackson, father of the President, died in February, 1767, and a few weeks after his death his widow, while on her way to the home of her sister, Mrs. Crawford, in South Carolina, where Mrs. Jackson intended to make her permanent abode, stopped at the home of Mrs. Margaret McKemey, in North Carolina, nearly a mile from the South Carolina line. While there, and while still a resident of North Carolina, she gave birth to a son, Andrew Jackson. It appears to be reasonably certain that President Jackson knew that he was born in this house, and it is equally certain that he died ignorant of the fact that the house was in North Carolina.

To the same effect are the statements of John Carnes, James Faulkner, John Lathen, Thomas Faulkner, Samuel

McWhorter, Jane Wilson, and others, all bearing the stamp of veracity. The site of the George McKemey house in North Carolina near the State line is established by the statements of Thomas Cureton and his son, Thomas Cureton, Jr., of "Lancaster District," South Carolina. James D. Craig, then of Mississippi, but formerly of Waxhaw, stated that he remembered hearing James Faulkner say that once, while sleeping with Andrew Jackson in the George McKemey house in Union County, N. C., Andrew Jackson told him. Faulkner, that he, Andrew Jackson, was born in that house, but that Jackson evidently did not know that the house was in North Carolina.

To the natural inquiry, why Andrew Jackson, with the facts respecting the place of his birth so readily at hand, should have been mistaken as to the State where he was born, it may be said that Jackson went to South Carolina when he was three weeks old, remained there till early manhood, and then departed for the wilds of western North Carolina and Tennessee, where he remained the rest of his life. After attaining mature years he doubtless never saw or communicated with those who knew in what State he was born.

South Carolina's effort to strengthen her contention that Jackson was a native of that State by endeavoring to identify a house within her borders as the George McKemey house is a tacit admission that Jackson was born in the McKemey house. It, therefore, strengthens North Carolina's contention, since the fact that George McKemey's house was in North Carolina is established by a chain of title given in the statement of Thomas Cureton.

SIDELIGHTS ON JACKSON.

The career of Andrew Jackson is warp and woof Americanism. The lives of other Presidents show none so thrilling, chequered and unique. Inconsistent in its consistency; simulant of a March day—alternate lights and shadows, rampant winds, scurrying clouds—dark yet radiant. Superbly valiant, courageous and defiant, he mastered direst difficulties in every period of his life and owed to himself alone his education, position and fortune.

His most painstaking biographer, James Parton, has written: "Andrew Jackson, I am given to understand, was a patriot and a traitor. He was one of the greatest of generals and wholly ignorant of the art of war. The first of statesmen, he never devised—he never framed a measure. He was the most candid of men and was capable of the profoundest dissimulation. A most law-defying, law-obeying citizen. A stickler for discipline, he never hesitated to disobey his superior. A democratic autocrat. An urbane savage. An atrocious saint."

DUEL WITH DICKINSON.

The duel between Jackson and Charles Dickinson occurred in Logan County, Kentucky, May 30, 1806. The circumstances of this affair are characterized by brutality of both participants, although Dickinson was unquestionably the aggressor and deliberately provoked Jackson to mortal combat with full purpose to kill him. It has been related that he bet $500 he would kill Jackson by his first shot, and it was also told that Jackson afterwards said, "I should have hit him if he had shot me through the brain." Dickinson was a famous duelist, a marvelous marksman who never missed

his aim, and who had been victorious in several "affairs of honor." While en route to the meeting place he exploited his marksmanship at a tavern, and, having cut by his bullet a slender cord at twenty-five paces, left it dangling from a tree, and requested the innkeeper to direct Jackson's attention to it should he pass that way. The agreement between the seconds to this duel is extant. It is as follows: "It is agreed that the distance shall be twenty-four feet; the parties to stand facing each other, with their pistols down perpendicularly. When they are ready, the single word, fire, to be given, at which they are to fire as soon as they please. Should either fire before the word is given, we pledge ourselves to shoot him down instantly. The person to give the word to be determined by lot, as also the choice of position. We mutually agree that the above regulations shall be observed in the affair of honor depending between General Andrew Jackson and Charles Dickinson, Esq." It is said that the provision that the pistols should be held downward was unusual, especially in this instance, as the unvarying manner of Dickinson in firing was to raise the weapon at arm's length above his head and lower it quickly to proper aim. The agreed manner of firing may have been the adroit suggestion of Jackson's wily old second, the significance of which escaped Dickinson in his cocksureness of results. But, notwithstanding the advantage which thus accrued to Jackson, he and his second, General Thomas Overton, a Revolutionary soldier, anxiously considered whether it would still be best for Jackson to attempt to fire first, and they finally agreed that it would not. It required no time for Dickinson to take aim, even though it was necessary for him to raise and lower his weapon; but Jackson was much slower.

Therefore, though it appeared that Jackson would certainly be hit, he preferred to risk being wounded or killed rather than miss the opportunity to take deliberate aim.

Dickinson's second won the choice of position, and it fell to Overton to give the signal to fire. Here is an authentic account of this thrilling event:

"Are you ready?" said Overton.

"I am ready," replied Dickinson.

"I am ready," said Jackson.

"Fire!"

Dickinson raised his pistol quickly and fired. Overton, who was looking with anxiety and dread at Jackson, saw a puff of dust fly from the breast of his coat, and saw him raise his right arm and place it tightly across his chest. He is surely hit, thought Overton, and in a bad place, too; but, no; he does not fall. Erect and grim as fate he stood, his teeth clinched, raising his pistol. Overton glanced at Dickinson. Amazed at the unwonted failure of his aim, and apparently appalled at the awful figure and face before him, Dickinson had unconsciously recoiled a pace or two. "Great God!" he faltered, "have I missed him?" "Back to the mark!" shrieked Overton, with his hand upon his pistol. Dickinson recovered his composure, stepped forward to the peg, and stood with his eyes averted from his antagonist. Jackson took deliberate aim and pulled the trigger. The pistol neither snapped nor went off. He looked at the trigger and discovered that it had stopped at half-cock. He drew it back to its place and took aim a second time. Dickinson reeled; his friends rushed toward him, caught him in their arms and leaned him against a bush. His trousers reddened. They stripped off his clothes. The blood was

gushing from his side. The ball had passed through the body below the ribs. Such a wound could not but be fatal. Overton went forward and learned the condition of the wounded man. Rejoining his principal, he said, "He won't want anything more of you, General," and conducted Jackson from the ground. Jackson had walked a hundred yards, Overton on one side and a surgeon on the other, when it was observed that Jackson's shoes were full of blood. "My God, are you hit?" exclaimed the surgeon. "Oh, I believe," replied Jackson; "he has pinked me a little. Let's look at it. But say nothing about it there," pointing to where Dickinson lay. Jackson's coat was opened, and it was found that the aim of Dickinson had been perfect. He had sent the ball precisely where he supposed Jackson's heart was beating. But the thinness of Jackson's body and the looseness of his coat combining to deceive Dickinson, the ball had only broken a rib or two and raked the breastbone. It was a very painful, bad-looking wound, but Jackson rode to the tavern with little assistance. He afterwards explained that the reason for his silence was that Dickinson had so constantly bragged that he was the best shot in the world and was so sure of killing him at the first fire he did not wish Dickinson to have the gratification even of knowing that he had struck him.

AN INNKEEPER'S DEBT SETTLED BY A GREAT BATTLE.

"And what did you design to do had you failed to maintain your position?" was asked General Jackson some years after the battle of New Orleans. "Why," replied that intrepid soul, "I should have retreated to the city, fired it, fought the enemy amidst the surrounding flames, and occupied a posi-

tion farther up the river. I should have so devastated the surrounding country that the enemy would have been compelled to retire."

The battle of New Orleans, one of the greatest land defenses in American warfare, was fought January 8, 1815, two weeks after the treaty of peace had been signed at Ghent, and news of the battle and news of the signing of the treaty did not reach Washington until February 4 and February 14. In this battle 700 British soldiers were killed, 1,400 were wounded, and 500 were captured. Eight American soldiers were killed, thirteen were wounded, and none were captured. Here was, indeed, an astounding disparity of losses.

When news of this great military achievement reached the old village of Rockford in Stokes County, and the event was being boisterously discussed and celebrated in the bar of the village tavern, the tavern keeper—a demure and quiet little man—during a lull in serving drinks unlocked his strong box, brought out his ledger of accounts, and, turning to a statement against "A. Jackson, Esq.," which had been regularly brought forward for a dozen or more years, made with his quill pen this entry on the credit side: "Settled in full, January 8, 1815, by the battle of New Orleans."

Chapter IV.

ANDREW JACKSON, LAWYER OF THE FRONTIER.

ONCE, at least, in the political history of North Carolina, the office sought the man. The office was solicitor for the Western District of North Carolina. The man was Andrew Jackson. The district comprised a portion of what is now Tennessee, and covered a howling wilderness five hundred miles from the outposts of civilization. The two principal courts of the district were held at Jonesboro and Nashville, one hundred and eighty-three miles apart, and united only by a rugged path which ran through a gap in the Cumberland Mountains and then entered a wilderness more dangerously infested with hostile savages than any portion of the western country. In those times in that place the greatest boon that a public prosecutor might expect was deliverance from a well-aimed shot in the back, and the highest regard he might hope to obtain, if not too officious, was that accorded an ineffectual meddler in sport between gentlemen. It was during the rare old days of sudden removal of judicial causes by mutual consent, of innumerable voluntary nonsuits in deference to intimations and even subsequent rulings of the court; times of arbitrary transfers of jurisdiction from judicial tribunals to wagers of battle, from the forum to the public square, where litigants sought to adjust their differences by physical force and mortal combat, spectatored by the public at large and the quondam court. To this high and hazardous office Andrew Jackson was appointed about 1790, and, conceiving that a citizen should never seek and never decline public duty, he was unreluctant to accept.

Andrew Jackson is altogether fascinating as a specimen to study, but, like all other mortals, is not entirely a model to copy. In many respects he was the most remarkable man ever elected President of the United States. The lives of other Presidents present none so thrilling, chequered and unique. James Parton, Jackson's biographer, whom John Trotwood Moore so severely discountenances in his admirable defense of Rachel Jackson, which was recently published in *The Saturday Evening Post,* metaphorically employs the following anecdote in presenting his estimate of Jackson:

"An English clergyman was appointed to a rural parish. The parish church was a fine, solid, old structure of the middle ages, with an ancient belfry, climbing ivy, cawing rooks, niche for holy water, venerable graveyard, and all other antiquities most dear in the eyes of a clerical Oxonian of that day. But the interior of the church was a sad disappointment and, to the young clergyman, a perpetual sorrow. There were indications that it had been originally finished in a costly and superior manner. There were pillars, small and large; there was groining in the roof; there were tombs and monuments and some dim remains of ancient carving. But the whole was covered with what appeared to be the dust of centuries, hardened into a dark and dismal crust. How to restore the ancient edifice! How to make the interior correspond with the picturesque exterior! The church wardens, the parish clerk, the sexton, all concurred in opinion on the subject, and that opinion was—WHITEWASH! With horror the fastidious pastor rejected the suggestion. But it led him to reflection, and reflection to inspection, and inspection to experiment, and experiment to discovery. The old church, he found, had been for centuries

subject periodically to the sacrilege of whitewashing. The dismal crust with which the interior was covered was nothing more than the whitewash of ages. The proper way, then, to restore the edifice to its original character was to remove with careful hand this odious accumulation from every part of the surface and let out its character to the light. It was a labor of years. With his own hands the zealous clergyman wrought, and at length, on an Easter morn, he saw his task complete, and the church was as fresh and clean and characteristic as when, six hundred years before, a Catholic bishop had chanted its consecration. What marvels were revealed! Marble pillars, tombs elaborately wrought and brilliantly colored, oaken carvings and finely finished walls of yellow stone. Yet the church was not a perfect church. The whitewash which had imprisoned many beauties had concealed some flaws—some serious, nay, some repulsive and shocking, flaws. It was still an old church, a very old church, which the modern eye had to learn to allow for and to like; and some there were in the parish who, after all, would have preferred the glare and monotonous perfection of a new and thick coat of whitewash. But the greater number saw with pleasure that now their old church, whatever its defects and faults, was honest, curious, interesting, and real."

BORN IN NORTH CAROLINA.

It cannot be doubted that James Parton, to whom Moore contemptuously refers as "a backdoor historian," was Jackson's most painstaking and authentic biographer. Indeed, the very term employed by Moore implies as much. What better vantage ground for intimate inspection of any man than his backdoor? Parton's biography was published in

1860; hear the methods he employed. Says he: "Of this man, who made such a stir in the world, who rendered to his country services which it will never cease to value, whose name is still a power among us, there has not yet appeared a biography which is both complete and credible. There is none which its own author thinks or would claim to be adequate to the subject. Hence these volumes which will attempt to supply the deficiency." And further: "I set out on a tour of the Southern and Southwestern States in search of knowledge. At Washington I conversed with politicians of the last generation who have now no longer an interest in concealing the truth. I visited North Carolina, where Jackson was born" (and it may be added here that but for Parton the place of Jackson's birth would be unknown); "North Carolina, where he studied law and was admitted to the bar; South Carolina, where he grew from infancy to manhood; Tennessee, where he lived so long and so happily; Alabama, the scenes of his early exploits, and other States, a third of the Union in all, receiving in each the recollections of men and women, bond and free, who knew him well, knew him at all periods of his life, lived near him and with him, served him and were served by him. One woman still lingers in extreme old age who thinks she remembers him an infant in his mother's arms. With her I conversed, as also with the gentleman who caught the hero's head when it fell forward in death. I listened also to many who were always opposed to him and still like him not. Manuscript letters of the General's in great numbers were freely given me to copy and other manuscripts only less valuable than these. Old files of Tennessee newspapers came to light that were full of Jackson and his early wild career. It seemed some-

times in Nashville as if the city had formed itself into a committee of the whole for the purpose of overwhelming the stranger with papers, reminiscences and hospitality."

There should, indeed, be cogent reasons for discrediting such a painstaking biographer. Tennesseeans justly revere the memory of Jackson; but why so sensitive to carping jibes at his youthful escapades and his turbulent nature? These were but the ebullitions of virile young manhood culminating in a factor valiantly used for his country. Why so resentful to thoughtless scoffs at his lack of amenities? It was the scar of a patriot warrior.

WHEN LAND SOLD FOR COWBELLS AND AXES AND CORN COST ONE HUNDRED DOLLARS A BUSHEL.

It is officially entered in the judicial annals of Tennessee: "January 12, 1789, Andrew Jackson, Esq., produced his license as an attorney at law and took the oath required by law." (Doubtless, the laws of North Carolina at that time required formal admission by an attorney at law in every district of the State wherein he intended to practice, for Jackson practiced law in counties of central North Carolina prior to 1789.)

The records of the quarter sessions of Davidson County, Tennessee, show that at April term, 1790, there were 192 cases docketed, and that Andrew Jackson appeared in 42. At January term, 1793, there were 13 suits, and Jackson appeared in every one. At April term, 1793, he was counsel in 72 cases out of 155. At July term, 1793, he was employed in 60 cases out of 132. In the four terms of 1794 there were 397 cases before this court, and in 228 of these Jackson

appeared as counsel. And during this and later years he also practiced at the courts of Jonesboro and other towns in east Tennessee. From Jackson's early phenomenal success as a practitioner there is the natural inference that he possessed rare necessary qualifications of a lawyer rather than a profound knowledge of the law, and the former are by far the greater to be desired, since knowledge may be acquired, while certain rare qualifications are innate. The litigation which engaged the attention of the courts of Tennessee at that remote period did not demand great legal talent. The civil practice was almost confined to simple suits in ejectment, trespass, etc., which any lawyer of average ability and common sense was capable to manage, and Jackson was ever strong and clear when not blinded by passion, prejudice or gratitude. The country being practically destitute of money, the commodities mostly in demand became specie of the realm. These were corn, coon skins and whiskey, axes, firearms and cowbells, with land substituting the standard of gold and buffalo hides supplying the demand for foreign exchange. An historian of those times has stated that in 1780 corn sold in West Tennessee for over $100 a bushel. Coon skins were utilized for clothing; whiskey, it may be assumed, was a thoroughly efficacious remedy for those disorders of the nervous system which are incident to wild, dangerous life on the frontier. Axes were indispensable in felling trees to erect stockades and homes and in clearing land for cultivation; firearms were prerequisites to subsistence and defense of life, and cows could not be located in the dense expansive cane brakes and morasses unless they were belled. While it may be reasonably assumed that, next to food, clothing and life itself, land was the *summum bonum*

of existence in that wild country, it seems that cowbells and axes sometimes prevailed; it is said that a square mile of land near Nashville was once sold for three axes and two cowbells, and that a "faithful rifle and a clear-tuned cowbell" was the purchase price of another tract of the same size. It was the almost unvarying custom to pay lawyers' fees with land, a square mile of land being the usual fee for conducting a suit of no great importance. It was doubtless due to this custom that Jackson was able to lay the foundation for the large estate he afterwards acquired.

JACKSON'S IGNORANCE OF THE LAW.

In 1797 Andrew Jackson filled an unexpired term in the United States Senate, but his record there seems to be a blank. He was not a candidate in the next election, and was soon afterwards appointed judge of the Supreme Court of Tennessee, which office he held for six years at an annual salary of $600. Next to that of Governor, who was paid $700 a year, this was the most lucrative salary paid to any official in Tennessee. Judge Jackson is never referred to as an authority; no decision of his is recorded. The recorded decisions of the Supreme Court of Tennessee began with those of his immediate successor, Judge Overton. It has been said that he maintained the dignity of the bench while actually on the bench, and that his decisions were brief, untechnical, unlearned, sometimes ungrammatical, and usually right.

Parton says that after Jackson was appointed to the Supreme Court bench he came within an ace of ruin through his ignorance of the law. One Allison mortgaged to Prior

85,000 acres of land in Tennessee to secure a debt of twenty thousand dollars, and Jackson was employed to foreclose the mortgage for a fee of ten thousand acres of the mortgaged land. Before proceedings were instituted Jackson was appointed judge and employed John Overton to act in his stead, agreeing to give Overton five thousand acres of the ten-thousand-acre fee. Foreclosure proceedings were concluded, suit being instituted in the United States District Court. Jackson received his five thousand acres, which he subsequently sold in small parcels with warranted titles; he bound himself, in case the titles ever proved unsound, to recompense the purchasers by paying them the value of the lands at the time the titles proved unsound, not the purchase prices paid. Years passed and the lands quadrupled in value, when a lawyer who was interested in a portion of the Allison lands discovered that the court which had decreed the foreclosure of the mortgage had no jurisdiction in the matter. It was a Federal court, and neither the mortgagee nor the mortgagor were residents of the State in which the suit was brought; both were residents of Pennsylvania. Jackson saw ruin staring him in the face—to fulfill his warranties would leave him penniless. He met the dilemma stoically. The foreclosure never having legally occurred, the lands belonged to the heirs of the mortgagor. To these Jackson went and presented the claim of the mortgagee, which then, by reason of interest (for it seems there was no statute of limitations to bar the debt), was greatly in excess of the original note. The heirs had become impoverished and readily relinquished for a consideration their claims, and Jackson's terrible blunder while actually a member of the court of last resort of his State was cured.

ANDREW JACKSON AND JOHN SEVIER.

Much has been told and written respecting the feud between Jackson and John Sevier. The strained relations between these gentlemen reached the breaking point while one was a justice of the Supreme Court and the other Governor of Tennessee. John Sevier was for twenty years the fighting man of Tennessee; he fought in thirty-five battles and was never wounded and never defeated. This was as a sweet morsel to the belligerent soul of the refractory Jackson; here was, indeed, a foeman worthy of his steel. Sevier was the first Governor of Tennessee, served three successive terms, was then out of office for one term because the Constitution of Tennessee forbade the serving by one man of more than three successive terms as Governor, but as soon as eligibility was restored he was again elected, and served for a second period of six years. He has been described as a man after the pioneer's own heart—easy, affable, generous and talkative; fond of popularity and an adept in acquiring it; a prince of the backwoods; the hope and trust of the beleaguered emigrant and the terror of the marauding savage. The natural incompatibility between Jackson and this man could not long lack pretext for conflict, but when Sevier caustically referred to Jackson's matrimonial escapade in his very presence the *casus belli* was actual and complete. "Great God!" cried Jackson, "do you mention her sacred name?" Shots were immediately exchanged, but, although a great crowd was present, no one was hurt. Various personal encounters ensued, concerning which there have been so many contradictory statements that none are worthy of credence. Giving the same significance as sportsmen to the term, there is not the slightest authority for the recently

published statement that Jackson "took pot shots" at Sevier. In common parlance this term is used to denote the taking of mean and unfair advantage, as when a hunter fires at a partridge while it is on the ground, instead of risking his aim after the bird has taken wing—an act regarded by sportsmen as reprehensible as shooting a fox or a coon instead of giving him a chance for his life with the hounds. Certainly nothing in Jackson's career as a fighter affords ground for charging him with lack of magnanimity or fairness toward a combatant.

JACKSON DARINGLY DEFIES ENEMIES.

It has been related that in 1803, during one of Sevier's campaigns for Governor, when animosity between Jackson and Sevier was thoroughly aflame, Jackson while on his way to hold court was admonished by a friend to turn back; that a combination had been formed against him, and that on his arrival at Jonesboro he would be tarred and feathered. Jackson at the time was suffering from intermittent fever, but, instead of turning back, he spurred his horse on to meet his enemies. When he arrived at Jonesboro he was too ill to dismount unaided. He went to his quarters in the tavern and took to his bed. A friend soon entered and verified the report Jackson had heard, and stated that Colonel Harrison "and a regiment of men" were in front of the tavern with the avowed purpose to tar and feather Jackson. His friend urged Jackson to bar his door. But Jackson arose, threw his door wide open, and said in a loud voice, "Give my compliments to Colonel Harrison and tell him my door is open wide to receive him and his regiment whenever they choose to wait on me, and I hope the colonel's chivalry will induce

him to lead his men, not follow them." The "regiment" either because they were ashamed to harm a sick man or afraid to attack a desperate one thought better of their purpose and dispersed. Judge Jackson recovered from his fever, held his court as usual, and heard nothing more of hostile designs at Jonesboro.

JACKSON AND THE OWLS.

It has been told that once Jackson arrived at the rendezvous of a company with which he intended to cross the wilderness to attend Nashville court after the party had left. It was evening and he had ridden hard, but there was no hope of overtaking his friends unless he started immediately and rode all night. With a single guide he took the path and came to the campfires of his friends just before daylight, but they had already resumed their march. He continued his journey, and was startled when daylight came to discover the tracks of Indians in the road, and realized that the Indians were following his friends. It was evident to the practiced eye of this man of the woods that the Indians far outnumbered those they were pursuing. Jackson pressed on till the tracks showed that the Indians were but a few minutes in advance of him. The guide here refused to proceed, and Jackson divided their provisions with him, saw him take the backward march, and Jackson pressed on alone, resolved at all hazards to save or succor his friends. At length he came to a place where the Indians had left the path and taken to the woods, with the evident purpose of getting ahead of his friends and lying in ambush for them. He reached his friends before dark, told his news, and the march was resumed. All that night and the next day they kept on their

way, and toward evening reached the cabin of a company of hunters who inhospitably refused to shelter them for the night. They marched on in a driving storm of wind and snow. At length they ventured to camp. Jackson had not closed his eyes for sixty hours and slept soundly in the snow. His party had passed the Indians before an ambuscade could be formed, but the Indians continued their pursuit, and upon reaching the cabin of the inhospitable hunters murdered every man of them and, satisfied with this, left Jackson's party unmolested.

Concurrent with Jackson's appointment as solicitor, his friend, Thomas Searcy, was appointed clerk of the court, and there comes directly from him an account of the following adventure which occurred when they were journeying as solicitor and clerk from Jonesboro to Nashville. A company of nearly a hundred, among whom were women and children, pitched camp at nightfall just after passing through what was regarded as the most dangerous part of the wilderness. They had marched almost continuously for a night and two days, halting not longer than an hour. Save the sentries and Jackson, who dozed against a tree, every member of the company was soon asleep. Jackson was attracted by the various notes of the owls that were hooting in the forest around him. A remarkable country, this, for owls, he thought, as he was falling asleep. Just then an owl startled him by setting up a louder hoot than usual nearer the camp.

JACKSON SAVES HIS COMPANIONS FROM MASSACRE.

Something peculiar in the note struck his attention. In an instant he was thoroughly awake. He grasped his rifle, crept to where Searcy was sleeping and awoke him.

"Raise your head and make no noise."

"What's the matter?"

"The owls—listen—there—there again. Isn't that a little too natural?"

"Do you think so?" asked Searcy.

"I know it," replied Jackson, "there are Indians all around us. I have heard them in every direction. They mean to attack before daybreak."

The more experienced woodsmen were aroused and confirmed the young lawyer's opinion. Jackson advised that the camp be instantly but quietly broken and the march resumed. This was done, tired and worn as the travelers were, and the company heard no further signs of the presence of Indians during the remainder of the night. A party of hunters who reached the abandoned camp an hour afterwards lay down by the fires and slept. Before day the Indians were upon them and killed all but one of the party. Near the same spot the following spring when Judge McNairy was returning to Jonesboro from court at Nashville and had no Jackson in his retinue, his party was surprised in the night by Indians and narrowly escaped destruction. The party was put to total rout, swam the river near which they camped and left their horses, camp equipage and clothing in the hands of the savages.

FRONTIER LIFE IN TENNESSEE.

The dangers and privations of no life on the American frontier equalled or surpassed those which were commonalities in the lives of the settlers of Tennessee—an unknown, unexplored, rugged, uncharted wilderness. No roads except Indian

trails, no food or provisions except those which taxed the capacity of the pack-saddle and wallet; surrounded and constantly harassed by murderous savages and ferocious wild beasts. And with the clear dawn of civilization, life, with no communication for hundreds of miles with the outside world, was still fraught with constant danger and made almost intolerable by privations. It has been authoritatively stated that from 1780 to 1794 the Indians killed, within five miles of Nashville, one person every ten days. Senator Felix Grundy who passed his childhood amid these perils thus alluded to them before the senate of the United States: "I was too young to actually participate in those dangers and perils, but I can remember when death was in almost every bush and every thicket concealed an ambuscade. If I were asked to trace my memory back and name the first indelible impression it received, it would be the sight of my elder brother bleeding and dying from wounds inflicted by the tomahawk and scalping knife. Another and another went in the same way. I have seen a widowed mother plundered of her whole property in a single night; reduced to direst poverty and compelled to labor with her own hands to educate and support her last son—he who now addresses you. The ancient sufferings of the west were great. I know it. I need turn to no document to teach me what they were. They are written upon my memory. Those of us who are here are but the remnant, the wreck of large families lost in effecting a settlement of the west. As I look around I see the monuments of former sufferings and woe. Ask my colleague what he remembers. He will tell you that while his father was in pursuit of one band of Indians another came and murdered his two brothers. Inquire of yonder gentleman what became

of his brother-in-law. He will tell you that he went out to battle and never returned. Ask that representative from Kentucky where is his uncle. He will answer that he was intrepid enough to carry a flag of truce to the hostile savages; they would not recognize the protection which a flag of peace threw around him and he was slain. If I turn to my old classmate and friend, now a grave and potent senator, I am reminded of a mother's courage and intrepidity in the son whom she rescued from savage hands when in the very grasp of death."

MAJOR LYNCH WAS HANGED ON A TREE WHICH ONCE STOOD AT FORWARD RIGHT-HAND END OF THIS BRIDGE WHICH SPANS LYNCH CREEK.

Chapter V.

THE FIRST ASSERTION OF AMERICAN INDEPENDENCE AND THE STRANGE STORY OF MAJOR LYNCH.

NATURE'S panoramist has wrought well for the lines of ancient Bute. Its southern contour appears resplendently eight miles north of Raleigh, just beyond the overhead pass on the State Highway from Raleigh to Henderson. Behind those undulating hills, most beautiful in the blue distance of October days, was made strange unwritten history. Silence broods there still; there one travels for many miles sequestered ways—"dim secluded ways," pleasing because of spacious unkept groves, to the eyesight most content; art vies not here for an edifice to please "the unknown God." Its people are attentive, kind and cultured; they are not now regaled by fame; but theirs is not a land where only the dead are great. Bute County was formed in 1674 and named in honor of Edward Stanley, Earl of Bute. In 1779 the name of Bute County was discontinued and the county was divided into the counties of Franklin and Warren.

As it refers to American history we all have been told all about tea. The attention of historians has been mainly attracted by the revolutionary storm central over Boston from 1765 to 1770. The most intense meteorological disturbances are frequently those of narrowest scope, and hence receive not widest comment. The storm of the American Revolution was preceded a dozen years by a disturbance that is practically unknown.

Even a true story, if hard to prove, is hard to tell. By many well-informed intelligent people it is implicitly believed that the origin of Lynch law, and the first assertion by overt act of American independence were one and the same event.

It is well known that American independence and American liberties were about two centuries apart; that American independence and the domiciliary rights of the English who settled in "the new world" are one and the same thing; that liberty and independence are not convertible terms, and that the American Colonies were never *dependents* of England. "Our fathers brought forth on this continent a new nation," said Lincoln—loosely employing the word "nation"—"conceived in liberty." The liberty thus conceived, though temporarily deterred, was never permanently impaired. The American Colonies were ever self-supporting and for a century and a half after these "truant children" set up housekeeping for themselves the refractory old mother never directly "passed the hat" among her wayward children for the upkeep at home, though she ever kept a watchful eye respecting how her children bargained and bartered for themselves. The ruction arose when, under the guise of raising money from the truant children for the truants' own use, it was shown that the real purpose was to spend the money at home. The truants, on the ground that they had no say in home affairs and were self-supporting, refused to contribute, though they otherwise submitted more or less to parental control.

The British ministry conceived the idea of taxing the American Colonies under the pretence of giving them protection, but the real intent was to relieve England from its

immense debt. In 1764 Parliament enacted that "towards further defraying the necessary expenses of protecting the Colonies it may be necessary to charge certain stamp duties upon them," and then ensued "the iniquitous Stamp Act," passed in February, 1765, repealed in March, 1766, but its spirit and intent soon revived by legislation having special reference to tea. A duty of three pence per pound was levied on all tea that was purchased in America, and a duty was also levied on paper, glass and several other articles. "In most of the towns from New Hampshire to Georgia," says an old historian, "the people assembled and resolved to discontinue the use of tea, which was now regarded as an herb noxious to the political constitution. In large commercial towns, regulations were adopted to prevent the landing of tea; committees were appointed to inspect merchants' books and to make use of other means to defeat the designs of Britain" respecting tea.

History has prestiged Boston as the militant premier in the assertion of American liberties. One historian, making special reference to "the bold measure," whereby armed Americans disguised as Indians, destroyed several cargoes of tea in Boston harbor, asserts that "In the Southern Colonies the public feeling did not lead to the same excesses, but in all of them means were found to compel the stamp officers to resign, and in all the colonies the Assemblies adopted resolutions in opposition to the Stamp Act."

Interestingly to the contrary is the belief that in 1764 Bute County, North Carolina (now comprising Franklin and Warren), refused to pay any taxes whatsoever, directly or indirectly, to the British Crown; that during that year, or shortly thereafter, Governor Tryon sent an officer of the

English Army to Bute County to collect taxes by distraint; that this officer, Major Lynch, was taken in custody by enraged citizens, whose crops of corn and tobacco he had seized, was given a "drum head" court martial trial, declared to be "an enemy of the realm," and was hanged.

Whence came this strange tale? Could it have been entirely imagined and passed from generation to generation in the folklore of Franklin County? "Why was it not immediately published?" someone asked. No newspaper was published in Franklin County until fifty years ago—*The Franklin Times*—and the story has since been frequently published in that paper. This event antedated Wake County, which was not established until six years afterwards, and Raleigh was laid out in 1792. It does not appear that any newspaper was published within a radius of fifty miles of Bute County until 1799, when Joseph Gales established *The Raleigh Register*. Why was this daring resistance to British rule not immediately spread abroad? inquires one skeptic. The county was sparsely populated, and Wheeler says, "The whole county, as one man, was for independence and liberty." Any telltale miscreant who was so intrepid as to convey tidings of this outlawry to British headquarters would have assumed an arduous and dangerous task. There were but two public highways in Bute County at that time, one through route from Smithfield to Warrenton, and one leading from the old county seat, Midway (this was before Louisburg) east towards Tarboro. In any event, communication with the outside world was meager and uncertain.

SCENE NEAR WHERE MAJOR LYNCH WAS TRIED AND SENTENCED TO DEATH.

HOW DID LYNCH CREEK RECEIVE ITS NAME?

An impartial consideration of this remarkable story suggests that we "shift the burden of proof" and demand explanation how Lynch Creek received its name. That stream is readily identified as lying entirely in Franklin County and is a confluence of Tar River. The name Lynch, as far as can be ascertained, is borne by no person in Franklin County today, and it does not appear from its public records that any person by the name of Lynch ever owned a foot of land in Franklin County. The name Lynch is used in that county only to identify a strangely meandering, singularly lonely and beautiful stream, and tradition says that the stream bears that name because a man named Lynch employed such high-handed methods to collect British taxes in Bute County in 1764, and that the inhabitants of the county so thoroughly despised British rule, that they apprehended him, formed an extraordinary court, proved his outrages, adjudged him "an enemy of the realm," sentenced him to death and hung him on a liveoak tree which stood on the bank of a stream, which was afterwards called "Lynch Creek," tradition also identifies the precise spot and the place of the trial.

Greenleaf, the great authority on the law of evidence, enunciates the doctrine that reasonable probability and not mathematical certainty, is the legal test of adequacy in weighing human testimony with a view to judicial determination. That in the absence of circumstances which generate suspicion of his veracity, every witness is presumed to be credible until the contrary is shown and the burden of impeaching his credibility is on the objector.

How did Lynch Creek receive its name? The name identifies no person in Franklin County today. The public records of the county fail to show that the name has ever identified any person in that county. Over thirty-five years ago Joseph J. Davis, late Justice of the Supreme Court of North Carolina, and who was born, lived and died in Franklin County, told, in my presence, as a story handed down for more than a century and as implicity believed by him, that Major Lynch, an officer in the English Army, was sent by the Royal Governor, William Tryon, to Bute County to collect taxes in 1767, and that he was arrested and tried by an extraordinary court, sentenced to death, taken two miles from the place of his trial and hanged on the bank of a stream, which was afterwards called Lynch Creek to commemorate the event.

Recently Dr. D. T. Smithwick, member of the North Carolina Historical Commission, and the North Carolina Folklore Society, and Hon. Wiley M. Person, well-known lawyer, both gentlemen old residents of Louisburg, and scions of the Revolutionary families of the old county of Bute, and Mrs. Annie Fuller Malone, sister of the poet Edwin Fuller, a woman notably scholarly and cultured, and others too numerous to name, have reiterated the story of Justice Davis, and Dr. Smithwick has shown where Lynch was tried and where he was hanged.

It is told that Lynch came from New Bern to Bute County practically unattended, specially commissioned by Governor Tryon to collect taxes, which were very much in arrears. Relying on his authority to secure aid by exercising his commission from the Governor, he proceeded to

levy on and to seize the farmers' crops of tobacco, corn and other produce, but meeting with so much resistance and being unable to secure any aid whatever, he became actually alarmed for his safety and attempted to return to New Bern. Finding that he was pursued he hid under a bridge over Red Bug Creek, about fourteen miles from where Louisburg now stands. He was taken into custody and carried twelve miles to the home of Benjamin Perry, tried at night by a committee of citizens, marched two miles to a point north of Louisburg and hanged on an oak tree near where a creek enters into Tar River. The exact spot where he was tried and the spot where he was hanged were pointed out. It is told that those who participated in the trial and execution of Lynch were arrested and gave bond to appear at Elizabeth City, but that Governor Tryon's trouble with the Regulators, the Battle of Alamance and the Revolution overshadowed the Lynch episode, the offenders were never brought to trial and the entire affair was forgotten or gave place to more important events of those stirring times.

ORIGIN OF LYNCH LAW.

It is reasonable to suppose that the unlawful hanging of an English officer named Lynch should have originated the term "Lynch law," which is now generally employed to denote the unlawful killing of a prisoner. It is equally reasonable to suppose that the term should have originated by reason of the fact that Colonel Charles Lynch, a brother of the founder of Lynchburg, Virginia, was notorious just after the Revolution in the summary punishment of criminals "without any superfluous legal ceremony."

My life-long friend, Marshall DeLancey Haywood, who said that the story of Major Lynch "sounded like a fairy tale" has cited me to a story from "Memoirs of Eminent North Carolinians," by John H. Wheeler, which recites that a famous Tory named Beard was hanged on Lynch Creek during the Revolutionary War by command of Benjamin Seawell without trial; that the man was afterwards cut down and regularly tried by court martial when life was nearly extinct, and that the term Lynch law originated from this event. The same story is told at considerable length in the Southern Historical Magazine for 1901. But all this was subsequent to the hanging of Major Lynch in 1764, the first overt act in defiance of British rule.

I "call the previous question," How did Lynch Creek acquire its name? History is prudish and betimes inconsistently incredulous. Many alleged historical facts, accepted as implicit truth, cannot as well stand the test of legal rules of evidence as the story that Lynch Creek, in Franklin County, North Carolina, received its name because a British tax collector was hanged on its banks by American rebels in 1764, and that this was the first overt act in America against British rule.

Chapter VI.

MYSTERY OF A PACK OF CARDS.

(*From The Franklin Times, 1903.*)

A PRIVATE English soldier by the name of Richard Lee was taken before a magistrate for playing cards during divine service. A sergeant commanded the soldiers at the church, and when the parson had read the prayers he took his text. Those who had a Bible took it out, but this soldier had neither Bible nor Prayer Book, so pulling out a pack of cards he just looked at one card and then at another. The sergeant of the company saw him and said, "Richard, put up those cards; this is no place for them." "Never mind that," said Richard.

When the services were over a constable took Richard before the mayor.

"Well," said the mayor, "why have you brought this soldier before me?"

"For playing cards in church."

"Well, soldier, what have you to say for yourself?"

"Much, sir, I hope."

"Very good, and if not, I will punish you more than you were ever before punished."

"I have been," said the soldier, "about six months on the march. I have neither Bible nor Common Prayer Book. I have nothing but this pack of cards, and I'll satisfy your worship of the purity of my intentions."

Spreading the cards before the mayor, he began with the Ace. "When I see the Ace it reminds me that there is but one God; when I see the Deuce, it reminds me of the Father

and Son; when I see the Tray it reminds me of the Father, Son and Holy Ghost; when I see the Four, it reminds me of the four Evangelists that preached, Matthew, Mark, Luke and John. When I see the Five it reminds me of the five wise Virgins that trimmed their lamps; there were ten, but five were wise and five were foolish and were shut out. When I see the Six it reminds me that in six days the Lord made Heaven and Earth; when I see the Seven it reminds me that on the seventh day He rested from the great work He had created, and hallowed it. When I see the Eight it reminds me of the eight righteous persons that were saved when God destroyed the world, namely, Noah and his wife, with his three sons and their wives. When I see the Nine it reminds me of the nine lepers that were cleansed by our Saviour, there were nine out of ten who never returned thanks. When I see the Ten it reminds me of the Ten Commandments which God handed down to Moses on tables of stone. When I see the King it reminds me of the King of Heaven, which is God Almighty. When I see the Queen it reminds me of the Queen of Sheba, who visited Solomon, for she was as wise a woman as he was a man. She brought with her fifty boys and fifty girls, all dressed in boys' apparel for King Solomon to tell which were boys and which were girls. King Solomon sent for water for them to wash; the girls washed to the elbows, and the boys to the wrists, so King Solomon told by that."

"Well," said the mayor, "you have given a good description of all the cards but one." "What is that?" "The Knave," said the mayor. "I will give your honor a description of that, too, if you will not be angry." "I will not," said the mayor. "Well," said the soldier, "the greatest

knave I know of is the constable that brought me here." "I do not know," said the mayor, "if he is the greatest knave, but I know he is the greatest fool."

"When I count how many spots are in a pack of cards, I find three hundred and sixty-five, as many days as there are in a year. When I count the number of cards in a pack I find there are fifty-two, the number of weeks in a year, and I find four suits, the number of weeks in a month. I find there are twelve picture cards in a pack, representing the number of months in a year, and on continuing the tricks I find thirteen, the number of weeks in a quarter. So you see, sir, a pack of cards serves for a Bible, Almanac and Common Prayer Book."

Chapter VII.

OBSERVATIONS BY COUNCIL S. WOOTEN.

(1905.)

I'M glad I'm a farmer. A farmer is in some respects an independent being. He can take a drink, say what he pleases, and nobody calls him to task for it. A friend said to me: "You ought to make some prohibition speeches." I said: "Why, how could I do that? As soon as I came off the stump some fellow would come and say, 'Let's take something,' and you know I would do it, and that would destroy the effect of the speech."

The greatest evil connected with whiskey drinking is the system of treating. There are not many men who will get drunk by themselves. I can keep it at my house and not take but two small drinks before supper and dinner. I have found it a bad practice to take before breakfast. One quart will last me ten days. Now that is moderate, but if I go to town and the boys get around me and get me to talking they have two or three drinks in me before I know it. The Saviour knew how weak was human nature when He said, "Lead us not into temptation." Knowing this I have always told the temperance people to go ahead and do all the good they could for I would throw no obstacle in their way. Raised as I was when it was kept at every man's house, and accustomed to take a little, I expect I shall take some a few days before my funeral.

Let me have a word with the men who drink. Let me relate a case that came under my observation. There is a man of culture and gentle breeding, with noble impulses and with a generous heart. He has a daughter who was

educated at the best schools in the North and South. She had been off on a visit and he met her at the train and carried her home. They arrived there about sunset. He went in the house and lay down on the bed to rest; soon he was asleep. About 9 o'clock he awoke and got up. His daughter had placed the covering over him to keep him warm. How thoughtful and womanlike. She heard him when he arose and she came in the room and said: "I tried to awake you, but I could not arouse you." The next morning he was sitting by the fire and she came in and sat down beside him, and she said to him: "You had too much whiskey last night." He looked in the fire and said nothing. She said: "Yesterday when you spoke to the good Methodist preacher I know he saw your condition." Then she began to cry. But he looked in the fire and said nothing. What could he say? He was the worst whipped man on the earth. Men and brethren, if you err and take a little too much don't abuse your wife and children, but look in the fire and say nothing.

Yet I have no quarrel with these temperance reformers, for they are good people and mean well. It is true there are some who are fanatical and say some foolish things, but they are to be excused as they feel so strongly on the subject, and their feelings run away with their judgment.

Boys, take warning from the youth of Childe Harold, and as a parting injunction to the older men I would say, if you will take too much don't be a brute and abuse your dear, sweet wives and poor little innocent children, but look in the fire and say nothing. May God help you in your infirmities and bless you with His never-failing grace and mercy is the New Year's prayer of an old man.

Chapter VIII.

A CREED.

(Written by a Brilliant North Carolina Journalist a Few Hours Before Taking His Life, When Recovering from a Drunken Spree.)

I BELIEVE in little children as the most precious gift of heaven to earth. I believe they have immortal souls created in the image of God, coming forth from Him and to return to Him. I believe that in every child are infinite possibilities for good or evil, and that the kind of influence with which he is surrounded in early childhood largely determines whether or not a budding human life shall bloom in fragrance and beauty, with the fruit thereof a noble, godlike character. I believe it is our mission to

> "'Step by step lift bad to good;
> Without halting, without rest,
> Lifting better up to best.'

"I believe in freedom, but not in license; in prompt, cheerful obedience; in punctuality, regularity, accuracy, industry and application; that wisely directed self-activity should result in self-control, in self-forgetfulness, in an increasing desire to choose the good, true and beautiful, and to contribute to the happiness of others.

"I believe in cultivating the intellect and the will, but I believe, too, in soul culture, and that out of this cultivation comes the more abundant life, bringing forth the fruits of spiritual kindness, gentleness, joy, peace, truth, faith, hope, love, reverence for God, for each other, and for all his lowly creatures.

"I believe that the white city of God, with its river of life and its tree of life is the divine type of the home with its life-giving love, sunshine and companionship, and its symmetrical unfolding of all the beauties of child life—physical, mental, moral and spiritual."

It would naturally be supposed that one whose soul could create this prose poem had lived in a happy home, that children had played across his knees, and that he had been surrounded by all of the blessings and comforts that come to a well-ordered life. It was otherwise with this man. He died like a dog in the police station of a strange city, childless and without a home.

SOME OBSERVATIONS BY JUDGE CHARLES M. COOKE.

A nigger who behaves himself is better than a white man who doesn't.

"Doin' fust one thing en den enuther." That's the poorest job a man ever had. That's what got you into this trouble.

You had that pistol Sunday. I'll let you pay the school teacher for one month. It's $25.00 and costs for carrying a pistol Sunday, $15.00 for other days.

People who write obituary notices are granted larger allowances than the license given to poets, but if you can't write it in a man's obituary that he was a law-abiding citizen, then what you can say is not its equivalent.

It is a pathetic position the negro occupies. Denied the franchise for the public good, the negroes have no power in making the laws or administering the laws. When these people, therefore, come into court, the weight of obligation rests very heavily upon us to see that they get absolute justice.

Chapter IX.

ALFRED MOORE AND JAMES IREDELL

REVOLUTIONARY PATRIOTS, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

AN ADDRESS DELIVERED IN PRESENTING THEIR PORTRAITS TO THE SUPREME COURT OF NORTH CAROLINA ON BEHALF OF THE NORTH CAROLINA SOCIETY OF THE SONS OF THE REVOLUTION, 29 APRIL, 1899

By Junius Davis, Esq.
A MEMBER OF THE SOCIETY

May it please you, the Chief Justice and Justices of the Supreme Court: At the request of the North Carolina Society of the Sons of the Revolution, of which I am a member, I have the pleasure and honor of presenting to you portraits of two of the ablest and most distinguished jurists of North Carolina—Alfred Moore and James Iredell.

As we recall the names and fame of the mighty giants of the law whose shadows now look down upon us from these walls, an involuntary feeling of wonder is excited in us that no one of them whose words have reached throughout this broad land, and, echoing across the wide ocean in the courts of England, have commanded respect there, should have been called to sit in that august tribunal which administers the laws of this great republic. And yet so it is, that only at the birth of that Court, a century ago, has a son of North Carolina been honored with a seat upon the Supreme Bench of the United States. Looking back over that one hundred years, what a retrospect is before us! In every department

of art, science and industry, in the art of war and in the arts of peace, what vast progress, what rapid strides have been made! And in no science has there been greater or broader progress than in the science of the law. When Moore and Iredell came to the bar the law was in its infancy—a vast unexplored field, with but few well-known landmarks to guide the toiling student on his way. Now that field is covered with a multitude of roads, ever branching out and crossing and intersecting and bisecting and overlapping each other, until the whole is one tangled maze, through which the brethren wander with dizzy brain and uncertain step. Whether the benefit to the world at large has been equal to the progress, is a question some cynics have asked, but which I will not attempt to answer. In that day a copy of Coke, Bacon, Hawkins, a few stray volumes of reports, perhaps the ancient Plowden, or Dyer, or Coke, a strong, luminous intellect, hard, common sense, and what my Lord Kenyon called "the reason of the thing," were all the weapons of the well-equipped lawyer. There were no encyclopedias, no codes, no State reports, but precious little home-made statute law, and no "case lawyers." Only strong men could succeed, and as a rule only strong men came to the bar. The lawyers of that day were not only laborious students, zealous and diligent in the pursuit of knowledge, but they were also the leaders of the people. More than all others, they moulded and directed public sentiment into that current which finally swept on to the creation of these United States. The prominent part which they were to take in the Revolution was foreseen by Burke, who, in a speech before Parliament in 1775, referring to the colonies, declared: "In no country perhaps in the world is law so general a study.

The greater number of the deputies sent to the Congress were lawyers. . . . I have been told by an eminent bookseller that in no branch of his business, after tracts of public devotion, were so many books as those on the law exported to the colonies. . . . I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England. . . . This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources." However, there were some things in which the judges and lawyers of that day in no wise differed from those of the present time, notably in that antagonism which always prevails when opinions differ. For, in 1783, we find Iredell writing to his wife in regard to one of his cases: "I think the proceedings are irregular and may be set aside, but there is no risking the plainest things with our judges."

But before Moore and Iredell, even as they came to the bar, was already looming up the black shadow of the coming Revolution. In the dark and weary days of gloom, of trouble, misery and woe, through which our people passed in their first struggle for liberty and independence, they did their duty well as men and patriots, the one in the field and the other in the halls of council.

It is impossible for us of this generation to realize to the full the conditions which confronted our ancestors. They had been taught to look up to England as a child to its mother, to love and reverence, to fear and obey her. She was the most powerful nation in the world, with a strong army, a mighty navy, and vast resources. The colonies were without money, without arms, without soldiers, without ships, and without friends. There was no quarter of the globe to which they could look with any hope for aid or assistance.

But there was no looking backward, no shrinking from the edge of peril, no fear or hesitation to "awake the sleeping sword of war" with the men of that day, but a stern, high, steady resolve to achieve that independence to which they had pledged "their lives, their fortunes, and their sacred honor." And, among those who carried themselves as true men in that great conflict, history tells us that Alfred Moore and James Iredell were prominent.

ALFRED MOORE

Alfred Moore was born in the county of Brunswick on 21 May, 1775. He was the son of Judge Maurice Moore, whose wife was Annie Grange. He came from a line of men who had written their names upon the history of the Old World and of the New. He was a lineal descendant of that Roger Moore who was one of the leaders of the Irish rebellion of 1641, and who, Hume says, "first formed the project of expelling the English and asserting the independence of his native country." James Moore, by some accounts the son and by others the grandson of Roger Moore, had emigrated to the Barbadoes prior to the accession of Charles II to the throne, and from there he came to South Carolina with Sir John Yeamans, whose daughter he married, and settled near Charleston, in the famous Goose Creek settlement in Berkeley Precinct.

It was a singular destiny which brought about this alliance and mingled in its offspring the blood of the Irish rebel with that of the English cavalier. Sir John Yeamans was the son of Robert Yeamans, who was high sheriff of Bristol in 1643, when that city was besieged by the army of

the Parliament under Lord Fairfax. So devoted to the cause of Charles was Robert Yeamans, and so sturdily and bravely did he bear himself in the defense of that city, that upon its capture, Fairfax, in his wrath, hanged him offhand in the street opposite his dwelling.

The Barbadoes had been an asylum for both Cavaliers and Roundheads, who, wearied of the strife and persecution of the Civil War, sought peace and rest in a distant land, and here came John Yeamans. He was one of the thirteen gentlemen of that colony who were knighted by Charles, when he came to his own again, for their sufferings and sacrifices in the Royal cause. He was also, in January, 1665, made Governor by the Lords Proprietors of the "County of Clarendon," afterwards the Province of South Carolina, stretching west from the Atlantic to those unknown waters called the Southern Seas, and south to the Spanish possessions in Florida, and was also a lieutenant-general. In May, 1671, he was created a landgrave and given 12,000 acres of land, and in the same year, for a second time, was made Governor. He carried with him to the Ashley his negro slaves, and, according to Bancroft, was the first to introduce negro slavery into the colonies.

James Moore was a bold, adventurous man, of high spirit, unflinching courage and strong mind, and he soon became a leader of men. He was Governor of South Carolina in 1700, and when succeeded in that office by Sir Nathaniel Johnson, in 1703, he was appointed Attorney-General of the Province. His eldest son, James Moore, was also Governor of South Carolina in 1720. He was one of the ablest soldiers of the province, and had greatly distinguished himself in the wars with the Spanish and Indians. When the Tuscaroras,

having recovered from their defeat by Barnwell, were again carrying the torch and tomahawk through the unprotected settlements of North Carolina, in 1712, and Governor Pollock called upon South Carolina for aid, James Moore, the second, was selected to lead the men from South Carolina. With him, as an officer, went his younger brother, Maurice, to whom we owe the first permanent settlement of the Cape Fear country. Traversing this region on his toilsome march to the Neuse, and seeing the beauty of the land, the fertility of the soil, and the commercial advantages of the river and harbor, it is reasonable to presume that he then and there conceived the project which he afterwards successfully carried out. Lingering in North Carolina, a few years after the return of his brother to Charleston, long enough to marry one of her fair daughters, he returned to Charleston, and gathering about him the families of all of his brothers and sisters (except his elder brother, James) and many of his friends, about the year 1723, for history leaves the exact time uncertain, he again struck into the wilderness, and settled them at and around Old Brunswick, on the west side of the Cape Fear River, about 13 miles below Wilmington. And this was the first permanent settlement of the Cape Fear region.

His two sons, Maurice and James, were eminent and distinguished men and ardent patriots. Maurice was one of the three judges of the province at the breaking-out of the Revolution, and was "a learned jurist, an astute advocate, and a keen-sighted statesman." James was a soldier and "considered the first military genius of the province." He was colonel of the First North Carolina Continental Regiment in September, 1775, and brigadier general in March, 1776.

Upon the departure of Lee for the North, in the summer of 1776, he was appointed by Congress Commander-in-Chief of the Southern Department. But, a few months after, however, his health failed, and he died in Wilmington on 15 January, 1777; and, on the same day, in the same house, died his brother Maurice, both "in the prime of life and in the meridian of their fame and usefulness."

In 1764, while yet a youth, Alfred Moore was sent to Boston to complete his education. Judge Taylor says that, "On the arrival of the British troops there, in 1768, he attracted the notice of a Captain Fordyce, a man of fine taste and acquirements, who became much attached to the youth, and offered to procure him an ensigncy in the army. This he declined, but, under the instructions of his friend, he learned the elements of military science, and furnished himself with a variety of knowledge, which highly qualified him for that stormy period in which he was destined to live."

On 1 September, 1775, while not yet of age, he was appointed a captain in the First North Carolina Regiment, commanded by his uncle, James Moore. After participating in the short but brilliant campaign which resulted in the total defeat and destruction of McDonald's Royalist Highlanders at Moore's Creek, in February, 1776, his regiment, then commanded by his brother-in-law, Col. Francis Nash (Col. James Moore having been appointed brigadier general in the Continental line), was ordered to Charleston to assist in the defense of that city against the threatened attack of the British under Sir Henry Clinton and Lord Cornwallis. With his company he bore his part in that memorable attack on Fort Moultrie in June, 1776, when the North Carolinians behaved with such gallantry as to draw from Charles Lee

the eulogium: "I know not which corps I have the greatest reason to be pleased with, Muhlenburg's Virginians or the North Carolina troops—they are both equally alert, zealous, and spirited." And what higher testimony to the valor of the North Carolinians could we have than this, when a Virginian reckons them as equal to the best regiment Virginia had sent to the field! After the repulse of the British at Charleston, Moore's regiment was camped at Wilmington where it was put through a rigid system of drill and discipline, which gave it the efficiency that distinguished it in the later northern campaigns.

In March, 1777, the regiment was ordered north to join Washington, who was then retreating through New Jersey and in great straits. Captain Moore did not accompany his regiment, for he had been compelled by the misfortunes and necessities of his family to resign his commission on 8 March, 1777. His brother Maurice, a lieutenant in his regiment, had but recently been killed, his father had died, and the utterly disordered and defenseless condition of the country around Wilmington commanded his presence at home. But, though no longer in the Continental line, he still kept the field, and, enrolling himself in the militia, became an active and zealous partisan. With a few raw but restless spirits he made himself such a thorn in the side of the British at Wilmington that Major Craig, in command there, sent a detachment to his plantation, which plundered his house, burned all the buildings on the place, carried away all his stock, and left him utterly penniless and destitute. But his lofty courage and ardent patriotism were unshaken by these trials, and he continued to lose no opportunity to harass his enemy whenever an opportunity afforded. Judge Taylor tells us that

Major Craig made every effort to kill or capture him, and, failing in both, sent him an offer to restore his property and give him amnesty if he would only return to his plantation and take no further active part in war. But this offer was spurned by him, and his efforts in the cause of freedom and independence were never relaxed until the final triumph.

The close of the war found him ruined in fortune and estate. His plantation was a waste, his slaves scattered and stolen, he himself without resources or money, his family almost destitute of food and clothing. His condition was, indeed, deplorable. He had, prior to the breaking-out of the war, studied law under his illustrious father. I have seen it stated that he was appointed Attorney-General of the State before he had obtained a license to practice law, but this is a mistake, for in the minutes of the County Court of New Hanover, April Term, 1775, I have seen the record of his producing a license to practice law in the inferior courts of the State and taking the usual oath required. It is certain, however, that if he had any practice at the bar it was but very limited and of very short duration.

At the June Term, 1782, of the Court for the Hillsboro District, in the absence of the Attorney-General, "The court," to use the words of Judge Williams, "got the favor of Col. Alfred Moore to officiate as attorney for the State, and without assistance, which the court experienced in a very essential manner, they could not have carried on the business of the court." There were many important criminal cases at this term, and seven capital convictions, for burglary, high treason, etc.

In 1782, the General Assembly of North Carolina, in grateful remembrance of his distinguished services, and in some

part to compensate him for his losses and unselfish patriotism, recognizing his eminent abilities, appointed him Attorney-General of the State to succeed Iredell, who had just resigned. We are told that the salary of the first two years of his office was paid in homespun and provisions. Think upon it a moment, your Honors—what would be the consternation, the utter misery of the present Attorney-General if such legal tender were proffered to him for his salary! To a weak man, the high position to which Alfred Moore had been called at the very outset of his career as a lawyer would have been but a quicksand and a pitfall. But he was anything but weak. Judge Taylor tells us that he had a mind of uncommon strength and a quickness of intellectual digestion that enabled him to master any science he strove to acquire. He was small in stature, scarce 5 feet 4 inches in height, neat in dress, graceful in manner, but frail in body. He had a dark, singularly piercing eye, a clear, sonorous voice, and those rare gifts of oratory that are born with a man and not acquired. Swift was his model, and his language was always plain, concise and pointed. A keen sense of humor, a brilliant wit, a biting tongue, a masterful logic, made him an adversary at the bar to be feared. Judge Murphey, in his address before the societies of the University, says: "Two individuals who received their education during the war were destined to keep alive the remnant of our literature and prepare the public mind for the establishment of this University. They were William R. Davie and Alfred Moore. Each of them had endeared himself to his country by taking an active part in the latter scenes of the war; and when public order was restored and the courts of justice were opened, they appeared at the bar, where they quickly

rose to eminence, and for many years shone like meteors in North Carolina. . . . Davie took Bolingbroke for his model; and Moore, Dean Swift. . . . Public opinion was divided upon the question as to whether Moore or Davie excelled at the bar. . . . Davie is certainly to be ranked among the first orators, and his rival, Moore, among the first advocates which the American nation has produced."

In 1790, indignant at what he considered an unconstitutional infringement upon his rights by the creation of the office of solicitor-general, and being worn and exhausted by the constant and arduous toil and labor entailed upon him by a large practice, he resigned his office, and, virtually abandoning his practice, retired to his plantation. He was a Federalist in politics, and in 1795 was defeated for the Senate of the United States by one vote. In 1798 he was elected one of the judges of the State and took his seat upon the bench. In delivering the opinion in *S. v. Barna Jernigan,* 7 N. C., 12, Chief Justice Taylor pays high tribute to his character and ability: "The very question, however, before us, has been decided in the case of *S. v. Hall,* in 1799, by a judge whose opinions on every subject, but particularly on this, merit the highest respect. Judge Moore was appointed Attorney-General a very short time after this act of Assembly was passed, and discharged for a series of years the arduous duties of that office in a manner which commanded the admiration and gratitude of his contemporaries. . . . His profound knowledge of the criminal law was kept in continual exercise by a most varied and extensive practice at a period when the passions of men had not yet subsided from the ferment of a civil war, and every grade of crime incident to an unsettled society made continual demands

upon his acuteness. No one ever doubted his learning and penetration, or that, while he enforced the law with an enlightened vigilance and untiring zeal, his energy was seasoned with humanity, leaving the innocent nothing to fear and the guilty but little to hope. The opinion of such a man, delivered on an occasion the most solemn on which a judge could act—when doubt in him would have been life to the prisoner—assumes the authority of a cotemporary exposition of the statute, and cannot but confirm me in the sentiments I have expressed."

In this connection I am reminded of a tradition that I heard from some of the seniors of the bar when I was first admitted to it. About the year 1816 there was a band of robbers and outlaws operating chiefly in Duplin, Sampson, Wayne and the nearby territory, whose chief purpose was enticing slaves from their masters, under the promise of freedom, and spiriting them away to the far Southern States and selling them. Chief among these were the Jernigans, and chief among them was the Barna Jernigan above mentioned. He had been indicted and convicted for enticing away the slave of one John Coor Pender, then sheriff of Wayne County. The story runs, that as Coor Pender was on his way to court to give evidence against Barna Jernigan he was waylaid, shot and killed by one of the band. His eldest son, then a lad of 19 years of age, vowed to devote his life to the pursuit and punishment of the murderer of his father. Alone he tracked him through North Carolina into South Carolina, through South Carolina into Georgia, through Georgia into Florida, where at last he found him—secure, as his coward's heart believed—refuged among the Seminole Indians. Nothing daunted, young Coor Pender boldly made

his way into the Seminole country and, addressing their chief, demanded the assassin with that plea so sacred and dear to the heart of the Indian, that blood alone can atone for blood. Bowing to the justice of the demand, the Seminoles surrendered the man, whose name, I think, was also Jernigan, to young Coor Pender. Binding his prisoner, unaided he brought him back through the long and wild journey and delivered him into the hands of justice in Wayne, where he was soon afterwards tried, convicted and hanged.

No brilliant feat of the days of chivalry can, to my mind, surpass this courageous and devoted act of this plain and simple young North Carolinian.

In December, 1799, Mr. Moore was called to the seat upon the Supreme Bench of the United States made vacant by the death of James Iredell. He first sat at the August Term, 1800, when, in *Bas v. Tingy,* 4 Dallas, 37, on the admiralty side of the docket, he delivered the only opinion emanating from him during the four years of his judicial life on that bench. This seems strange, and forces us to inquire the reason for this singular silence of so able a lawyer. The answer is found in the pages of Dallas and Cranch, and is given by Mr. Carson in his "History of the Supreme Court of the United States," who tells us that it was owing to the practice which obtained after Marshall came upon the bench, of making the Chief Justice the organ of the Court. So strictly was this rule adhered to, that during Justice Moore's term of office the opinion of the Court was always delivered through the Chief Justice, except in one or two instances, when he expressly declined to do so, and then that duty fell upon the senior Justice. We must remember that the Court was then but an infant, its docket exceedingly light, and it

was no great labor for one judge to write all the opinions. There can be no doubt, however, that in the solemn deliberations of the conference chamber Moore's opinion upon every question under discussion was given in clear, concise and logical argument, was listened to with deference, and carried the weight of his great talents with it. He remained upon the bench about six years, when his failing health compelled his retirement and he resigned in 1804. He died 15 October, 1810, in the fifty-fifth year of his age, "a loyal, just and upright gentleman," carrying with him to the grave the blessed comfort of a well-spent life, the affection of his friends, the sincere respect and reverence of all men, and the grateful appreciation of his native State.

JAMES IREDELL

James Iredell was born in the quaint and historic old town of Lewes, Sussex County, England, on 5 October, 1751. He was the oldest child of Francis Iredell, a merchant, of Bristol, who had married Margaret McCulloh. Through his mother he was nearly related to Henry McCulloh and his son, Henry Eustace McCulloh, who owned immense bodies of land in North Carolina in the last century, and this relationship was destined to have an important influence upon his after-life. When he was about 16 years of age, his father, through misfortune and ill health, became so reduced in estate that his relatives came with loving care to his aid. It was but natural that they should seek to advance the elder son and secure for him a position in which, in time, he could be a help and prop to his parents in their declining years. Through the influence of his relative, Sir George McCartney,

on 29 February, 1768, Iredell was appointed comptroller of the customs at Edenton, to which place he came in the latter part of 1768. And, as an incidental duty, the McCullohs put upon his shoulders the supervision of their interests in Carolina, without any suggestion or thought on their part of recompense to him for the labor.

It seems that in the effort to secure this appointment for him, his youth was studiously concealed in the very reasonable fear that knowledge of it would be death to the hope. The very suggestion of a lad of 16 to be comptroller of His Majesty's customs would have seemed ridiculous even to the careless Charles. But how shall we speak our admiration of the high spirit, the stout heart, the self-reliant courage of this boy, who, tenderly reared and carefully nurtured, in obedience to the call of duty, leaving all that were near and dear to him, crossed 3,500 miles and more of ocean to assume the unknown duties of a responsible office in a wild and new country, where the red man yet boasted himself the master, and the white man barely clung to the shore by the tips of his fingers! But it was duty that called him, and duty and filial love that impelled him to promise to send to his parents all the salary he should receive from his office. And it is pleasing to know that this promise was religiously kept and that he faithfully remitted all his salary to England, only reserving the scanty fees of the office for his maintenance. And so was the boy the father to the man.

Edenton was then but a village of a few hundred inhabitants, but in and around it dwelt many gentlemen of means, of culture and of learning, who were among the first in the province and destined to be leaders in the coming movement which lost Great Britain her great plantations. Here he met

Harvey, Hewes, Jones, Charlton, Dawson, the Johnstons and others, and soon became their friend and constant companion. Among them was Samuel Johnston, of the family of "the gentle Johnstones of Annandale," whose sister, Hannah, Iredell afterwards married, and whose example and influence, more than all else, shaped his future career.

Soon after he had become familiar with the duties of his office, Iredell commenced the study of law under Samuel Johnston. Alternating his devotions between his law books and his lady love, and equally diligent in his application to both, in two years after his arrival, and while in his nineteenth year, on 14 December, 1770, he received a license from Governor Tryon, with the approbation and recommendation of Chief Justice Howard—that "eminent vagrant," as Jones styles him—to practice law in the inferior courts of the State.

On 26 November, 1771, he obtained a license from Governor Martin to practice in the Superior Courts, and became a full-fledged lawyer. McRee tells us that when he first appeared at the bar "he had a difficulty to encounter which but few experience and fewer surmount as he did. He had a natural impediment in his speech which would have abashed and discouraged weaker minds if possessed of but half of his delicate sensibility." But even this impediment was conquered by the stout courage of his heart, and he soon stood among his seniors as their equal.

In 1771, the restless tide of discontent, stimulated by the arbitrary measures of the crown, and swelling with the news of the Boston massacre, was steadily rolling and spreading as it went through the colonies, and nowhere with more resistless force than in North Carolina.

Iredell, though scarcely aware of it himself, was already in the current and drifting toward the day when he was to stand boldly forth for the cause of liberty.

In 1773, the dispute in this State over the Court Acts, which had been rife for some time, culminated. The Assembly insisted upon the right of attachment against foreign nonresidents, and the crown was equally insistent against granting it. The terms of the judges and the life of the courts had expired by limitation. The Assembly passed new laws for the creation and organization of the courts and tacked the attachment law to it. The Governor refused his assent and dissolved the Assembly, leaving the province without courts and without laws. For some time there were only five provincial laws in force, and the only courts were those held by single justices of the peace. In fact, the courts and the supreme majesty of the law were not fully reëstablished in North Carolina until November, 1777. Crime went unpunished, wrongs were unredressed, and person and property alike were without the security and protection of law. This condition of affairs was but the forerunner of the coming storm whose mutterings were already growing near and clearer, presaging "the lean famine, quartering steel and climbing fire," that were so soon to desolate the land. On 18 July, 1773, Iredell married Hannah Johnston. Their union was a most happy one in every respect. She was a loving wife, a prudent and faithful administrator of the domestic economies of their household, and a wise and able friend and counsellor, to whom he ever brought the full story of his joys and triumphs, his sorrows and reverses. The charming letters which passed between them are the highest evi-

dence of their loving devotion to each other, their mutual trust, confidence and respect.

In 1774, the Revolution was well on in North Carolina. Harvey, Johnston, Harnett, Hooper and others were in active correspondence, zealously engaged in preparing and shaping public sentiment to meet with ready courage the approaching crisis. Iredell was an active but silent participator and adviser in all their counsels. Although scarce 23 years of age, he was already in full maturity of mind, of judgment, and of action. Springing at a bound from youth into the full panoply of manhood, he stood and moved among the foremost men of his time as their peer, and his advice and opinions on all questions of public moment were eagerly sought and referred to by them. William Hooper, then some 32 years of age, was easily one of the ablest and most prominent men in North Carolina, as a scholar, a lawyer, a statesman, and a patriot. On 26 April, 1774, we find him writing to Iredell: "I am happy, my dear sir, that my conduct in public life has met your approbation. It is a suffrage which makes me vain, as it flows from a man who has wisdom to distinguish and too much virtue to flatter. . . . *Whilst I was active in contest you forged the weapons which were to give success to the cause I supported.* . . . With you I anticipate the important share which the colonies must soon have in regulating the political balance. *They are striding fast to independence,* and ere long will build an empire on the ruins of Great Britain."

In this short extract we are forcibly impressed with three things: Hooper's deferential appreciation of the approbation of Iredell, his graceful recognition of the great assistance which Iredell was even then rendering to the patriotic cause,

and his bold and early declaration for the independence of the colonies. And yet Hooper was the man whom that great apostle of the people, Thomas Jefferson, a few years later, in the bitterness of envy and jealousy, declared to have been the greatest Tory in Congress. The falsity of this accusation is plainly apparent to any person who has ever followed Hooper's course during these troubled times. Fortunately for him, and fortunately for his State, his unwavering devotion and loyalty to the cause of freedom, and his unfaltering determination to achieve independence at any and every cost, has been faithfully recorded by the brilliant and erratic Jones in his celebrated "Defense of North Carolina." It is evident that Hooper was alluding in this letter to the project of a Provincial Congress, the first of which met in New Bern on 25 August, 1774, with John Harvey as moderator. John Harvey, William Hooper, Samuel Johnston, James Iredell, and Willie Jones were the five men who projected and, more than all others, accomplished this assembly of the people.

The second Provincial Congress in North Carolina assembled at New Bern on 3 April, 1775, and, although he was not a member, so fully was he in sympathy with the movement that Iredell went there to assist with his counsel and advice, so welcome to all.

The events that followed are matters of common knowledge: Martin's frothy proclamation, the grim defiance of Congress, his flight to Wilmington and final refuge on the sloop-of-war, *Cruiser*. In November, 1776, Iredell was appointed by the Congress one of the commissioners to revise the laws of the State, and it is said that the celebrated Court Law of 1777 was the work of his pen. In November, 1777,

the law courts were reëstablished; and on 20 December, Samuel Ashe, Samuel Spencer, and James Iredell were elected the first judges of the free and independent State of North Carolina. Iredell was then barely 26 years of age. He had been warmly urged by his friends for the office of Attorney-General, which, it seems, he would have preferred, but was defeated in that by Waightstill Avery, whom he was soon to succeed. In June, 1778, he tendered his resignation to Governor Caswell, who received it with great reluctance, saying he well knew the place could not be supplied "by a gentleman of equal abilities and inclination to serve the State in the important duties of that office."

In January, 1779, when the Assembly was about to appoint delegates to Congress, it expressed through the speaker to Iredell, who happened to be present, its desire to appoint him, but what he called his poverty compelled him to decline with reluctance.

On 8 July, 1779, Iredell was appointed, by Governor Caswell, Attorney-General in place of Avery, who had resigned. We have all reflected with sympathetic pity upon the weary and toilsome life of that poor and patient servant of the Lord whom the irreverent were accustomed to call the "circuit rider," and yet his travels were but a summer day's journey compared to those of the leading lawyers of Iredell's time. When the courts opened, they followed the judges, from Edenton to Hillsboro, from Hillsboro to Halifax, from Halifax to Salisbury, from Salisbury to Wilmington, and from Wilmington to New Bern. Their way lay through the wilderness, over swollen rivers, through pestilential swamps, through rain and snow, hailstorm and sunshine, their usual conveyance a one-seated gig, and their lodging place as chance and

the fortunes of the road might determine. The duties of his office entailed upon Iredell so much arduous labor and brought with it such small compensation that, in 1782, when peace was assured by the surrender of Cornwallis, he resigned to become again what he called "a private lawyer." Cases and clients came to him rapidly, and in July, 1783, he writes his brother that he had a share of practice "very near equal to any lawyer in the country."

In 1786, following the passage of the Confiscation Acts, the question of the power of the court to declare void an act of the Legislature because in conflict with the Constitution, was raised in this State by some of the bar and vigorously supported by Iredell in an exceedingly strong and able pamphlet. In this pamphlet, which was published in the New Bern paper of 17 August, 1786, Iredell says: "It will not be denied, I suppose, that the Constitution is a *law of the State,* as well as an act of the Assembly, with this difference only, that it is the fundamental law and unalterable by the Legislature, which derives all its power from it. . . . An act of Assembly inconsistent with the Constitution is void and cannot be obeyed without disobeying the superior law, to which we were previously and irrevocably bound."

In the celebrated case of *Bayard v. Singleton,* 1 N. C., 5, at May Term, 1787, in which Iredell, Johnston, and Davie were counsel for plaintiff, and Moore and Nash for defendant, that question was first discussed and decided in the courts of this State. In reading the report of this case, one is struck with the great and proper reluctance of the judges to approach the decision of the point so novel and strange. They suggested to the litigants first one and then another method of compromise and settlement, but, driven to it at

last, they faced the issue as true men. Mr. Haywood, in his argument in *Moore v. Bradley,* 3 N. C., 140, attributes the merit of that opinion to Judge Ashe, and says that he illustrated his opinion by this forcible language: "As God said to the waters, 'So far shall ye go, and no farther,' so said the people to the Legislature." Afterwards, when upon the Supreme Bench of the United States, in *Calder v. Bull,* 3 Dallas, 386, and again in *Chisholm v. Georgia,* Iredell took occasion to declare in emphatic language his opinion to be, "If any act of Congress or of the Legislature of a State violates those constitutional provisions, it is unquestionably void; though I admit that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority but in a clear and urgent case." This doctrine, so clearly and admirably stated in these few and concise words, is now the law in every State of this Union, and is universally taken to have been so settled by the opinion of Marshall in *Marbury v. Madison,* 1 Cranch, 137. I cannot but think it singular that, in his opinion in this case, Marshall makes no reference whatever to either of the three cases above mentioned or to the earlier cases in Rhode Island and Virginia. The language of Iredell, in *Calder v. Bull,* is so clear-cut and logical that it could not have escaped the notice of the Chief Justice. In our busy life we seldom pause to reflect upon the far-reaching results, the inestimable blessings of these decisions. How often in our history has Congress and Legislature, in the mad lust of power and the wild riot of party hate, striving to accomplish unholy and unwholesome legislation, been halted by the stern mandate, "So far shall ye go, and no farther." England's greatest statesman once said, "The poorest man may in his cottage bid defi-

ance to all the force of the crown; it may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement." But this vaunted liberty of the British subject can bear no comparison to that of the American citizen, who, dwelling under the shadow of the mighty Constitution, is secured by it in the fullest enjoyment of his life, his property, and his liberty.

In the famous State trials at Warrenton, in January, 1787, Alfred Moore prosecuted for the State, and Iredell and Davie defended.

In November, 1787, Mr. Iredell was appointed by the General Assembly a member of the council and sole commissioner to revise and compile the acts of the General Assemblies of the late province and present State of North Carolina. This task was faithfully and ably executed by him, and the work, printed in 1789, afterwards became widely known and celebrated as "Iredell's Revisal."

In 1787, the question of the adoption of the new Federal Constitution was agitating the people. Iredell was one of its ablest and most energetic advocates, and by his labor and eloquence, more than any one else, contributed to its final ratification and adoption in November, 1789. In January, 1788, he published a long and most admirable pamphlet in its support, in reply to the objections of George Mason. He was a member of the convention which met at Hillsboro on 21 July, 1788, to consider its adoption. Alfred Moore and William Hooper were both candidates for this convention. In instance of the strong ties of friendship which bound these two men together we read that Moore, certain of his election

in Brunswick, and fearing Iredell's defeat in Chowan, urged Iredell to become a candidate from Brunswick. Preferring to represent his own people, however, he fortunately declined and was elected, while Moore and Hooper were both defeated. In this convention Iredell was the leader of the Federalists, and the burden of the argument for his party was thrown upon his shoulders. McRee tells us: "He defended, he removed objection, he persuaded, he appealed to interest, and awakened into life the spark of national pride. His vigor, and the extent and variety of his attainments excited the admiration of his adversaries. His words were neither too few nor too many, but such as were in common use, and conveyed his ideas clearly and distinctly to the simplest understanding; his style was terse and condensed; his arguments, direct and solid, struck the mark with the force of cannon balls."

Though not successful, he was not defeated, for the convention would neither reject nor adopt. His fame had now reached far beyond the limits of his State, and Washington, led to a conviction of his great abilities by his debates in the convention, and his answer to Mason's objections, appointed him to the Supreme Bench of the United States in place of R. H. Harrison, who had declined.

On 10 February, 1790, Pierce Butler, of the Senate, writes him: "You have this day been nominated by the President, and *unanimously* appointed by the Senate, to the Supreme Federal Bench. I congratulate the States on the appointment, and you on this mark of their well-merited opinion of you." That he had won the respect and confidence of Washington is well known to us. In a letter of 1 February, 1790, his distinguished brother-in-law, Samuel Johnston, then a mem-

ber of the lower house of Congress, tells him: "I have just returned from dining at the President's with a very respectable company. . . . The President inquired particularly after you, and spoke of you in a manner that gave me great pleasure." His commission was dated 10 February, 1790, and his first services were on the circuit, where, with Rutledge, he rode the Southern Circuit, then composed of South Carolina and Georgia, North Carolina not having adopted the Constitution when the Judiciary Act of 1789 was passed. He first took his seat on the Supreme Bench at the August Term, 1790, when, after the reading of his commission and the admission of a few counsel, the Court adjourned from the lack of business.

Let us pause here for a brief moment and think upon the work which was carved out for the members of that Court. The questions that were to arise before them were in the highest degree grave and important. An entirely new field of jurisprudence was opened out, in which they were to find no precedents. The unique questions of the amenability of the States to the process of the Court, their relations to the Federal Government, the limitations and definitions of the powers of the Federal courts, the interpretation of the Constitution, the independence of the Federal judiciary as a coördinate branch of government, the obligations of the Treaty of Peace, the extent of the power of Congress to levy taxes and duties, questions of prize, the Confiscation Acts, patent rights, violations of the embargo, land laws, ownership of slaves, citizenship, and many others of like importance and first impression were to be raised, argued, and decided. And when we reflect upon the magnitude of their task and of their successful elucidation of the intricate

judicial problems brought before them, we cannot withhold our wonder, our admiration and our reverent respect for the first judges of the Federal Supreme Court. Speaking of its first meeting, Mr. Carson has eloquently said: "Not one of the spectators of that hour, though gifted with the eagle eye of prophecy, could have foreseen that out of that modest assembly of gentlemen, unheard of and unthought of among the tribunals of the earth, a Court without a docket, without a record, without a writ, of unknown and untried powers, and of undetermined jurisdiction, there would be developed in the space of a single century a Court of which the ancient world could present no model and the modern boast no parallel—a Court whose decrees, woven like threads of gold into the priceless and imperishable fabric of our constitutional jurisprudence, would bind in the bonds of love, liberty and law the members of our great republic."

At the February Term, 1793, the celebrated case of *Chisholm v. Georgia,* an action of *assumpsit,* came up before the Court. This case was instituted at the August Term, 1792, of the Supreme Court, which under the Judiciary Act, had original jurisdiction in such cases, in virtue of Article III, section 2, of the Federal Constitution. At that term the Attorney-General moved that notice issue to the State of Georgia to enter an appearance, or show cause why judgment should not be entered and a writ of inquiry awarded. The Court, "in order to give the State time for deliberation" and, I apprehend, themselves opportunity for study and careful thought, postponed the consideration of the motion to the next term, when it was argued by Randolph, the Attorney-General, alone, counsel for Georgia filing a written protest against the jurisdiction and declining to argue the question.

The point in the case was, whether a State was amenable to the jurisdiction of the Court at the suit of a citizen of another State. The first case, I believe, in which one of the States was sued in the courts of another State by a citizen was instituted at the September Term, 1781, of the Court of Common Pleas at Philadelphia, by one Nathan against the State of Virginia, and in it an attachment was issued and levied on a lot of clothing belonging to the State. The Virginia delegates in Congress, indignant at this affront, and protesting it to be *a violation of the law of nations,* appealed to the Supreme Executive Council of Pennsylvania, which arbitrarily ordered the sheriff to release the goods.

In *Chisholm's case,* the Court upheld the jurisdiction; Jay, Blair, Wilson, and Cushing delivering opinions. Iredell dissented in quite a long argument, in which, voicing the sentiment of the Federalists, and true not only to the tenets of that party, but to the profound convictions of his mind, he denied the jurisdiction. His opinion is a memorable one, and, in my humble judgment, for clear and lucid reasoning, cold logic, strong argument, and high statesmanship, was far superior to that of any of his colleagues. In it he virtually enunciated the doctrine that later on became so famous and prominent in the disputes and differences between the North and South under the name of "States Rights," or the "Sovereignty of the States." Marshall, the great expounder of the Constitution and the greatest jurist America ever produced, had boldly declared it in the Virginia Convention of June, 1788. The decision of the Court created a storm of excitement and discussion throughout the States. Two days after it was promulgated, the Eleventh Amendment to the Constitution, which declared that the jurisdiction of

the Supreme Court should not extend to suits against a State by citizens of another State or subjects of a foreign State, was proposed in Congress, and afterwards passed by it, and adopted and ratified by all the States.

It was the custom at that time for all of the judges to deliver opinions in the important cases, and we find the volumes of Dallas enriched by the profound and exhaustive arguments of Iredell, notably in *Calder v. Bull, Penhallow v. Doane, Hylton v. United States, Ware v. Hylton,* and *Talbot v. Johnson.*

Always independent in thought and action, he never failed to dissent when the reasonings of his mind led him to differ with the majority of his brothers on the bench, or to express his views when agreeing with them upon the general result, he arrived at the same conclusions by a different road. But in all cases, so strong, clear and logical were his opinions that they always compelled attention and respect, even when they failed to persuade. Unquestionably, he was the ablest constitutional lawyer upon that bench until the advent of Marshall, and in all other respects the equal of Justice Wilson. While his labors upon the Supreme Bench were but light, those of the circuit were arduous and exhausting, his circuit at one time compelling him to travel 1,800 miles. He was a laborious and indefatigable student and writer, and while upon the Supreme Bench occupied his leisure moments in writing treatises, the publication of which were probably prevented by his untimely death. Among his manuscripts were found "A Treatise on Evidence," an "Essay on Pleading," and a paper on "The Doctrine of the Laws of England Concerning Real Property in Use or in Force in North Carolina," the two latter of which were unfinished.

I cannot pass on without some slight mention of the correspondence of Iredell and the vast wealth of history bequeathed to us by it. To us the great wonder is, how the chief men of that day found the time to devote to social correspondence; but men then, like men now, were always eager and striving for the news; and, in the lack of newspapers, it was disseminated and carried from one to another, and passed on and on through the colonies by means of letters. The man of that day who was no letter writer lived outside of the history of the times and heard no news. Iredell's letters were models, and numbering, as he did, among his correspondents the chiefest men of the day, hand down to us living pictures of the leading characters and stirring events of his life.

In the summer of 1799, his honorable life was nearly spent. The severe labors of the circuit, and the climatic influences of the sickly region in which he lived and traveled, had undermined his constitution, and his health gave way. He was unable to attend August Term of the Court, and, slowly failing, at last died at Edenton on 20 October, 1799, in the noon of life and the zenith of his glory.

The daily walk and life of Iredell, from the boy of 17 to the statesman and jurist of 48, so vividly pictured to us by McRee, reads like an epic poem. The immature lad of 17, torn by stress of fortune from a gentle home and transplanted in a strange and wild land, springing in a day into the maturity of manhood, rising abruptly into the full radiance of public life, called in rapid succession from one high office to another, until he had exhausted all, and filling all with equal roundness until at the last, weary and worn, he sinks into rest, followed by the love and respect of all.

In reviewing his life, I am at a loss which most to admire—his gentle dignity, his amiable disposition, his independence of thought and action, his sturdy self-reliance, his equipoise of mind, his high character, or his splendid abilities. Throughout the whole period of the Revolution, when North Carolina was in her most perilous strait, there is scarce a page of her history upon which the name of Iredell is not written.

I cannot close this sketch without acknowledging in some slight way my obligation for all there may be of interest in it to the biographer of Iredell. I knew Mr. McRee well when I was a youth, and when I came to the bar enjoyed the privilege of his friendship—a landmark upon my way in life upon which I shall ever look back with pleasant recollections. He brought to his work the loving devotion and reverence of a kinsman, a brilliant and discriminating intellect, an untiring zeal and interest and the facile pen of a polished scholar. Disdaining the arts of rhetoric, his style is clear and concise, ever striving for facts and preserving truth at the expense of sentiment and popular opinion. Happy was Iredell in his biographer, and fortunate the State of North Carolina in such a son. His book is the greatest and most valuable contribution to the social history of the State that has been or ever will be written, and also to its political history, unless we except the recent Colonial and State Records. By his work let him be remembered, and his name handed down from one generation to another as one who did his State great service. No more enduring monument, no more glorious epitaph could he have than the grateful and affectionate remembrance of his countrymen, which he deserves in the most eminent degree.

There is a close and striking parallel between the lives of Moore and Iredell. Their way through life was ever upward. Together they trod with equal step the lofty paths of fame, and, attaining the highest offices in the State, in the line of their profession, at last reached the most exalted station which the aspiring lawyer can hope to touch. Both were judges and attorney-generals of the State, and both were Justices of the Supreme Court of the United States.

When Iredell resigned the office of Attorney-General, Moore succeeded him, and later on was appointed to the seat upon the Supreme Bench of the United States made vacant by his death. North Carolina, in grateful and affectionate remembrance of her two sons, named one of her counties Moore and another Iredell. Federalists in politics and alike in thought upon the great issues of the day, attracted to each other by the same high and noble traits of mind and character which both possessed in an eminent degree, they became warm friends early in their acquaintance, and so remained during life. At the bar they ever disdained the small arts of the pettifogger, and upon the bench, blindfolded, they ever held the scales of justice with an even hand, treating with equal impartiality the rich and the poor, the guilty and the innocent.

May the example of their useful lives, their spotless integrity, and their distinguished services inspire coming generations to emulate them and follow in the lofty paths they walked through life.

"And History shall cherish them
Among those choicest spirits who, holding their
consciences unmixed with blame,
Have been in all conjectures true to themselves,
Their Country, and their God."

Chapter XII.

PRESENTATION OF PORTRAIT
OF
CHIEF JUSTICE LEONARD HENDERSON

By Hon. R. W. Winston

Mr. Chief Justice and Associate Justices of the Supreme Court of North Carolina:

"When Cellini's statute of Perseus was first exhibited on the Piazza at Florence, it was surrounded for days by an admiring throng, and hundreds of tributary sonnets were placed upon its pedestal." We are assembled today in this hall whose walls are adorned with portraits of our State's great jurists, and in the presence of worthy successors to those judges whose "dignity, wisdom and ability have made North Carolina's proudest possession her courts of justice," to hang in its proper place, between Taylor and Ruffin, a portrait of Chief Justice Henderson. In the name of the living kinsfolk of him, of whom Judge Pearson, in the leading case of *State v. Deal,* 64 N. C., 273, declared, "His powers of reflection exceeded that of any man who ever had a seat on this bench, unless Judge Haywood be considered his equal in this respect," I present to you this portrait of Leonard Henderson, one of the first justices of this Court upon its organization in its present form in 1818, and Chief Justice of this Court from 1829 to the date of his death in 1833.

The Chief Justice's grandfather was Colonel Samuel Henderson, who was the first high sheriff of Granville County.

The Henderson family removed from Hanover County, Virginia, to Granville County, North Carolina, about 1740, and here Colonel and afterwards Judge Richard Henderson, son of Samuel Henderson, married Elizabeth Keeling, from which marriage sprang the jurist, Leonard Henderson. A man's education begins, they say, hundreds of years before he is born, and hence it is not difficult to trace to their source certain characteristics of the Chief Justice—his originality, his independence, his rugged personality. How could he have been otherwise? Samuel Henderson, the grandfather, strong and rugged, had executed his writs, subpœnas, and other processes, afoot through the forest primeval, traversing a territory from Virginia on the north to Johnston on the south, and from the mountains on the west to Northampton on the east. "The father, Richard Henderson, holding the minor office of constable, and fired by a noble ambition, determined to enter the profession of the law." He accordingly read such books as were to be had, and after a short time presented himself for examination to the Chief Justice of the General Court, upon whose certificate of proficiency the Governor would issue a license to practice law. When this stripling of the law made known to the examiner that he had scarce been sorrowing at the feet of Coke and Littleton twenty months, not to mention twenty years, he was rudely advised to go home and not undertake to stand for his license, to which our undaunted young disciple of Themis stated with promptness and spirit that he had come not to ask advice or seek a favor, but to demand a right. It is needless to add that the license was worthily won, in the teeth of the most rigid examination. Subsequently, Colonel Richard Henderson attained the highest honor of the pro-

fession under the Royal Government, and after the War of the Revolution and the adoption of the Constitution of the United States, he was elected one of the first three Justices of the Supreme Court of North Carolina. This office he shortly resigned, or refused to accept, the reason being that he had more ambitious schemes afoot. He had undertaken to establish a new colony in the west, and to this end had organized the Transylvania Land Company, which purchased of the Cherokee Indians vast tracts of land in Kentucky and Tennessee. The position of Governor or President of this colony called him from his new honors in North Carolina. This colony progressed so far that it sent delegates to the Continental Congress at Philadelphia, asking to be admitted as the fourteenth State of the Union. Of Colonel Henderson it is said that he was the only private American citizen who had a chaplain of his own. When he went into Kentucky with his expedition he was accompanied by a clergyman of the Church of England, who acted as chaplain of his forces, and opened with prayer Henderson's first Legislature. This good man was shortly afterwards scalped by the Indians, who no doubt found him an easier prey than the heroic president of the company.

Wheeler, in his Reminiscences, gives some interesting facts connected with the life of Colonel Richard Henderson. "On 1 March, 1769," quoting from the record, "at a meeting of the council, there being present Governor Tryon, John Rutherford, Benjamin Herron, Lewis DeRossett and Samuel Strudwick, Richard Henderson was appointed assistant judge, as also Maurice Moore, Esq. Governor Tryon reports that 'Richard Henderson, Esq., is a man of ability, born in Virginia and living in Hillsboro, where he is highly es-

teemed.'" Colonel Henderson must have led a life of much daring and some adventure. For example, on 24 September, 1770, he wrote Governor Tryon that on that day Herman Husbands, James Hunter, Wm. Butler, Ninian Bell Hamilton, Jeremiah Fields, Matthew Hamilton, Eli Branson, Peter Craven, John Truitt, Abraham Teed and Samuel Parks, armed with cudgels and cowhide whips, broke up the court and attempted to strike the judge and made him leave the bench. They assaulted and beat John Williams severely, and also Edward Fanning, until he retreated into the store of Messrs. Johnston and Thackston, and demolished Fanning's house. Not only were these beaten, but Thomas Hart and John Ludlow, clerk of the crown, and many others were severely whipped. Another entry of date 25 January, 1771, is an order entered by the Regulators that Richard Henderson, who appeared as prosecutor of several charges against Thomas Person, should pay all costs!

Judge Richard Henderson's family consisted of five sons and two daughters. Of these William Henderson was a gallant soldier of the Revolution, Lieutenant-Colonel of the Third South Carolina Regiment, captured at Charleston, exchanged to First South Carolina Regiment, a hero of Eutaw Springs, where he was severely wounded 8 September, 1781. Archibald Henderson, an elder brother of the Chief Justice, was declared by Judge Murphey to be "the most perfect model of a lawyer the bar has ever produced, and he contributed more to give dignity to the profession than any lawyer since the days of General William R. Davie and Alfred Moore." One need not be told that he was the grandfather of John Steel Henderson, of Salisbury. Archibald Henderson was wont to say that he had known many good lawyers, but

few good judges, and in true Baconian fashion, proceeded to grade the judicial qualifications in this wise: First of all, good common sense; next, an intimate knowledge of men, particularly of the middle or lower classes—their passions, prejudices and modes of thought; thirdly, good moral character, subdued feelings without prejudices and partiality; then, independence and energy of will; and, last of all, legal learning. Mr. Henderson must have been a most loyal party man to cast his vote as a member of Congress for Burr instead of Thomas Jefferson for President of the United States. Most of the Congressmen from our State voted for Mr. Jefferson. Indeed, so strong a Federalist as Marshall was induced by Hamilton to vote for the Republican, Jefferson, rather than for Burr. This is the real secret of the Burr-Hamilton duel, the remark made by Hamilton concerning Burr at the gubernatorial caucus in Albany being but the pretext. Mr. Henderson was buried in Salisbury, and a monument was erected to his memory by the bar of Western North Carolina, this being the only monument ever erected in North Carolina to a member of our bar by his fellows. He was often a member of the General Assembly and a representative of his district in Congress. He left surviving two children, Archibald Henderson, and a daughter, who married Judge Nathaniel Boyden, the family traits being admirably preserved in a grandson, Archibald Henderson Boyden, sometime mayor of Salisbury. Another son of Richard Henderson, and a younger brother of Chief Justice Henderson, was John Lawson Henderson, who often represented the Borough of Salisbury in the General Assembly, was Comptroller of the State, and Clerk of the Supreme

Court, and died in Raleigh in 1834. Still another son was Pleasant Henderson who removed to Cabarrus County.

A bit of romance attaches to the maternal line of the Chief Justice. His mother was Elizabeth Keeling, and she was a daughter of Lord George Keeling, so doughty a defender of the Protestant faith in Ireland that he was expelled from Parliament and fled to the State of Virginia, where after getting together enough money by fishing with improvised nets in the Rappahannock to pay the expenses of his affianced, Miss Bullock, of crossing over from Wales to Virginia, they were happily married and became the parents of Elizabeth, aforesaid, the mother of Chief Justice Henderson. And albeit Elizabeth in time became the first lady of the land, she was so careful and thrifty a housewife that she taught her sons, who were to become lawgivers, statesmen and jurists, the gentle art of carding and spinning!

The great Chief Justice was no less fortunate in his friends and neighbors and in the county of his birth than in his ancestry. The county of Granville, bearing the proud name of John Carteret, Earl of Granville, stretching from the everlasting hills on the border well into the cotton belt in the east, was in itself a vast domain. In the hill country, on Nut Bush Creek, a few miles from the waters of the fast flowing Roanoke, was born 6 October, 1772, Leonard Henderson. Hard by his home was Williamsboro, named for Judge John Williams, whose sister Leonard's paternal grandfather had married. And at Williamsboro was Springer College, and Saint John's Church, and the home of John Stark Ravenscroft, first Bishop of North Carolina, and of John Penn, signer of the Declaration of Independence, of Col. Robert Burton, member of the Continental Congress, of

John Louis Taylor Sneed, afterwards Chancellor of Tennessee, of Robert Goodloe Harper, of lordly Governor Turner, and a little later of the splendid classical school of Reverend Doctor Alexander Wilson; of William Robards, Treasurer of North Carolina; of William Hill Jordan, most eloquent of divines; of Patrick Hamilton, grandfather of the accomplished general counsel of the Atlantic Coast Line R. R. Co., and of the Hargroves, Bullocks, Carringtons, Roysters and Baskervilles, gentle folk possessed of broad acres, troops of slaves, and dogs of all degrees. Near the end of the eighteenth century, William Lee Alexander invaded this charmed circle and bore away Elizabeth, sister to Leonard. But we shall forgive him for the gift of a grandson, sturdy scion of sturdy stock, who now sits upon this bench. It may not be uninteresting to note that this section was a close second to Chapel Hill as a suitable site for the location of our University; that at Williamsboro both the Judge and Solicitor resided, and that from the Williams family at Williamsboro, descended Gen. R. F. Hoke, Chief Justice Pearson, John Sharp Williams, of Mississippi; Richmond P. Hobson, of Alabama; Hoke Smith, of Georgia; Calvin Graves, R. B. Glenn, the Settles and Dockerys and that great teacher and sweet spirit, Ralph H. Graves. Williamsboro of the eighteenth century was not without its attractions—a well ordered race course—the best in the State—and a generous tavern, for such the hotel was called, modeled after an English coffee house, and presided over by Col. Samuel Henderson. Here judges and lawyers and travelers of all kinds were hospitably entertained. Here George Washington paid a short visit, and from here went forth hunting parties into Virginia and up and down the fast flowing Roanoke. Perhaps the familiar

name "The Lick," by which Williamsboro was then called, had reference to the habits of the deer and to the spot where weary travelers, as well as the antlered monarchs of the forest, might gather for refreshment. Often making one of these parties was Pleasant Henderson, a brother to Leonard, who had removed to Cabarrus and married. We are indebted to this man, for from him was lineally descended one who but lately passed from earth, beloved beyond any man of his day, bearing the grand old name of gentleman—Hamilton C. Jones, of Charlotte.

The Henderson home was called "Jonesboro," and the plantation, containing some six hundred acres or more, stretched across Little Island Creek, another tributary of the Roanoke. Across from "Jonesboro" was "Montpelier," the home of Judge Williams, and in the distance was hospitable "Burnside," where the Hamiltons lived, and nearer to the village stood the "Sneed Mansion House," and not far away was "Belvidere," the romantic home of Captain Jack Eaton, and "Nine Oaks," where resided Broomfield Ridley, who married into the Henderson family and moved to Tennessee, becoming the ancestor of judges and doctors of divinity, and in easy reach stood "LaGrange," owned by John Hare, Esq., a friend of the Hendersons. We may pause to remark that it was in this vicinity that an incident in the early life of Edwin G. Reade, then a penniless youth, turned his mind to the law and gave to North Carolina one of its clearest-headed jurists. The home and its environs made an impression upon the life of the future Chief Justice. Even in ruins, says Dr. Kingsbury, Williamsboro is the most antique village to be found. It lacks but another Goldsmith to become another Sweet Auburn of the Plains. There is a

ruggedness in the foothills of our mountain system, a serenity in the solemn forests of oak and pine, a spirit of reflection in the fast flowing streams hastening to swell the tide of the Roanoke, on whose banks the red man had but lately pitched his tents and then silently folded them forever, that made of Leonard Henderson a man. Here grew up the boy, occasionally making a visit to his relations in Salisbury, frequently mingling in the society of Hillsboro and Oxford, but always retaining his individuality. His education was confined to the instruction of a local teacher, Rooker by name, introduction to the Greek and Latin Classics by Rev. Mr. Pattillo, a Presbyterian clergyman, the course of learning prescribed at Springer College, and one or two sessions at Salisbury. This preliminary work accomplished, he began the study of law in real earnest, and drank deep from the fountains, guided in his task by Judge John Williams, his relative. In 1795 he married his cousin, Frances Farrar, a niece of Judge Williams, and of this union three sons and two daughters reached maturity and married, to wit: Archibald Erskine Henderson, Dr. W. F. Henderson and John L. Henderson, Frances who married Dr. W. V. Taylor, and Lucy who married Richard Sneed. Shortly thereafter he was appointed Clerk of the District Court at Hillsboro, where he resided for several years. The State was then divided into a small number of districts, in each of which a court of Supreme jurisdiction was held twice a year, and as each district comprised several counties, the clerkship must have been an office of no little emolument as well as dignity.

"The district system of courts was abolished in 1806, and the present plan by which a Superior Court is held at least twice a year in each county, took its place. The State was

divided into six circuits, and a judge was elected for each circuit. The judges were not required to reside in their circuits, and they might ride the circuits to suit themselves, but no judge might ride the same circuit twice in succession. The Supreme Court was held in Raleigh, by the same judges, twice a year, in the intervals of the Superior Court ridings. Two years after the adoption of the Superior Court system, Leonard Henderson was chosen by the General Assembly to fill a vacancy caused by the death of his relative, Judge McCoy, and removed with his family from Hillsboro to Williamsboro. The General Assembly at that time was composed of members of the Republican party, while Judge Henderson was an ardent supporter of Hamilton and Madison. At the same session of the General Assembly, David Stone was chosen Governor of North Carolina, he being at that time a leader of the Republican party. The election of Mr. Henderson in these circumstances was a high tribute to his character and eminent qualifications."

After eight years service as a judge, upon the meagre salary of $1,600 per year, he resigned his office and resumed the practice of his profession at Williamsboro. Judge W. H. Battle assigns as a reason for his resignation, that a man of limited means with an increasing family, could not well afford to perform the arduous duty of riding two circuits, composed of ten counties each, and of assisting to hold two terms of the Supreme Court, for so small a salary. Neither official dignity and repose, nor a just sense of public duty could prevent such a man from returning to a profession whose emoluments might supply the increasing wants of his family.

Soon after his return to Williamsboro, though the exact date is not known, Judge Henderson opened the first law

school ever established in the State. If this school had its beginning prior to 1810, it was probably the first law school established in the United States. Judge Henderson is therefore justly entitled to be called the "Father of North Carolina Law Schools." Doubtless it was while students at "Jonesboro" that Richmond Pearson and W. H. Battle dreamed of the day when they too would establish schools of law, modeled after that of Leonard Henderson, and become the idols of their boys and wear the ermine, even as did their beloved preceptor, and "Jonesboro" became the father of Richmond Hill and of the University Law School. Attracted by the fame of Judge Henderson's law school and by the culture and refinement of its surroundings, generous youth from far and near gathered to receive instructions in the law. Among others were Richmond Pearson, William Horne Battle, Judge Robert Ballard Gilliam, Judge Burton and Governor H. G. Burton.

In an appreciative and faithful sketch of Judge Henderson, by Judge Battle, we are told that he did not deliver regular lectures, nor appoint stated hours for recitations, but directed the studies of his pupils, urging them to apply to him at all times for the solution of their difficulties, and was never better satisfied with them than when by their frequent applications to him for assistance, they showed they were studying with diligence and attention. As an instructor, Judge Henderson was thorough and accurate. While he did not formulate the case-system of instruction, the credit of this great discovery belonging to Prof. Langdell, of Harvard, still, if tradition count for aught, his young students were not ignorant of concrete cases, selected by their teacher from the vast volume of business dispatched by him as a judge.

Indeed, Richard Bullock, Esq., the wealthiest man in the community, and a justice of the peace, often had his patience taxed to the limit by the enthusiasm of these twigs of the law, as they valiantly flashed their maiden sword in defense of hapless offenders in his court. Is it not after all, the office of a law school to train men to think, to be firm, to be obedient to constituted authority, to frown down upon lawlessness, to create a healthy, clean public sentiment—rather than to give them something practical? In a word, to teach law in the *grand* manner, and to make great lawyers. Was Judge Holmes correct in saying, "It is from within the bar and not from outside that I heard the new gospel that learning is out of date, and that the man for the time is no longer the thinker and the scholar, but the smart man, unincumbered with other artillery than the latest edition of the Digest and the latest revision of the statutes"? If he was, were it not well to abolish the quizzing process? Henderson and Pearson—Gamaliel and Saul—these men would rather their students reasoned correctly, though they gave a wrong answer, than that they reasoned wrong and stumbled upon the right answer.

Judge Henderson was a thorough-going Federalist. He belonged to that class mentioned by Justice Connor in his sketch of Gaston who were apprehensive of the political future of our country under the guidance of Jefferson. He could but anticipate the day "when in the State of New York, a multitude of people, none of whom have had more than half a breakfast, or expects to have more than half a dinner, will choose a legislature, and when on one side a statesman will be preaching patience, respect for vested right, strict observance of public faith—on the other will be a

demagogue, vaunting about the tyranny of capitalists and money lenders, and asking why anybody should be permitted to drink champagne and ride in a carriage, while thousands of honest folk are in want of necessaries, and he could but ask himself which of these two was likely to be preferred by a working man who hears his child cry for more bread. And he saw danger and danger only in the teachings of Jefferson, the Idealist, if not the demagogue (!) of Jefferson who was then teaching that "constitutions should not be looked upon with sanctimonious reverence, nor deemed like the ark of the covenant, too sacred to be touched, that laws and institutions should go hand in hand with the advance of the human mind, that the office of judge should be for four or five years, which would bring their conduct at regular periods under revision and probation."

These things were most shocking to the Federalists of that day, and yet it is but a truism that no constitution has ever been written which did not bear the impress of Jefferson's mind, and we of the twentieth century can thank the God of nations equally for Hamilton and Marshall and for Jefferson and Jackson, for Henderson as well as for Macon. The resultant of these contending forces is "The States," time's noblest offspring. We have no fear for our country, nor will capital and labor clash, so long as legislative bodies shall continue to enact laws protecting childhood, shortening hours of labor, creating old age pensions, regulating public service corporations, taxing incomes, and so long as the courts of last resort see to it that coaches and six are not easily driven through these beneficent statutes. One who seeks the formative period of political opinion in America, must look to the State Conventions held at the end of the eighteenth century.

The Convention for North Carolina convened in Saint Matthew's Parish Church, Hillsboro, in 1788. There the parties lined up for the battle, and on one side or the other from that day until the war drum sounded in 1861, the people of North Carolina, differing from each other upon the fundamental principles of government, contended as two strong men standing face to face. Samuel Johnson, President of the Convention, and Davie and Iredell, founders of the Federalist party, afterwards becoming the Whig party, opposing, and by a vote of 184 to 84, vanquished by Wiley Jones, Timothy Bloodworth, and other tribunes of the people, leaders of the Republican party, subsequently becoming the Democratic party. These leaders found valiant allies in Nathaniel Macon and the Henderson brothers, respectively. While the victory perched first on one banner and then on another, the Republican-Democratic party, ever keeping close to Jefferson, and remaining in the ascendant, in 1789 at Fayetteville reversed the action of the Hillsboro Convention. In a few short years, General W. R. Davie, the aristocratic leader, went down in defeat before Willis Alston in a heated contest for Congress. Whereupon General Davie, our erstwhile representative at the Court of Napoleon, became so much disgusted, not only on account of the turn of affairs and of his own defeat, but particularly on account of the manner in which it was brought about, his rough and ready antagonist, Willis Alston, having originated and circulated a most laughable joke which did much to create a sentiment hostile to the General, that he removed to more congenial regions in South Carolina.

The fame of Leonard Henderson rests not mainly upon his capacity as a teacher, but upon his eminent qualifications

as a judge of this Court. His pupil, Judge Battle, states that he was unquestionably a man of genius and in early life had studied with assiduity and success the principles of the common law and had made himself familiar with its grounds and reasons. He was never content until he had thoroughly comprehended whatever he met in the course of his reading. "On one occasion while he was a student, he came upon a passage in Bacon's Abridgment, which he could not understand, and his teacher being from home so that he could not get it explained, he came very near throwing aside his books in despair and abandoning the profession forever. He had an honest as well as strong mind, and in all his arguments we find predominant an anxious search after truth. For this reason he was restive when he found himself opposed by precedents which he thought were unsupported by principle. Whatever fault he had as a judge was owing to this disposition, but notwithstanding that, he must always be regarded as standing high among those who before and after him have adorned the Supreme Court bench of North Carolina." His services as a Supreme Court Judge embraced a period of fifteen years and his opinions may be found reported in the 4 to the 17 N. C., inclusive.

In 1825 an interesting question arising out of the doctrine of warranty, was presented to this Court in the case of *Taylor v. Shuford,* 11 N. C., 129. Mr. Badger, with his usual force and clearness, had contended that a deed without covenants of warranty would not pass an after-acquired estate to the original grantee, his argument being that conveyances which operate without transmutation of possession, as releases, grants of incorporeal hereditaments and deeds which owe their operation to the statute of uses, have no

such effect of themselves and that they pass only what the grantor hath and if he hath nothing they pass nothing. Mr. Badger further contended that if the grantor afterwards acquires title, it inures to himself and not to the grantee. But, if warranty be added to such conveyance, then by force of the warranty and not of the conveyance, the grantor is estopped and title subsequently acquired shall inure to the benefit of the grantee. The inference is conclusive from those cases that no grant, release or deed operating under the statute of uses creates any bar except by force of an express warranty annexed to it. With this technical, though cogent reasoning of Mr. Badger, Chief Justice Henderson took issue with some tartness, as the opinion will show, and in his usual direct fashion, thus: "If A sells to B by indenture, he thereby affirms that he has title when he makes his deed, and if he had not and afterwards acquires one, in an action by him against B, the title of the latter prevails, not because A passed to him any title by his deed, for he had none then to pass, but because A is precluded from showing the fact." A vast amount of learning has been exhausted upon this abstruse question, as may be seen by reference to Prof. Mordecai's instructive and suggestive Law Lectures, title "Estoppel by Warranty." It must be highly gratifying to the descendants of Chief Justice Henderson that his decision in *Taylor v. Shuford* was finally adopted by the Supreme Court of the United States in *Van Ranselar v. Kearney,* 11 Howard, U. S., 298.

Judge Henderson's style, as shown in his reported opinions, was clear, crisp and aphoristic. Thus after deciding that the right of trial by jury must be sacredly preserved and that an act of the Legislature which simply *permits* an appeal is

not a compliance with the constitutional guarantee of trial by jury, and after construing the word "ought" to mean "must," and to be imperative, he concludes: "It is sufficient for the creature to know the will of the creator. Obedience is then a duty without an express command." In arguing this appeal, Potter, on behalf of the appellant, declared that "it was enough for his purpose to say that if he had shown that the acts giving jurisdiction are unconstitutional, any proviso saving the right of appeal, cannot make them constitutional." All of which is respectfully submitted for the consideration of the newly discovered Recorder's Courts. So again in *Britton v. Israel*, 10 N. C., 225, Judge Henderson boldly declares that even where there is an express warranty of soundness, if the unsoundness be apparent, and, therefore, must have been known to the purchaser, no action shall lie.

As was said by Judge Battle in his Memoir of Chief Justice Henderson in the *University Magazine* for November, 1859, the first three Judges of our Supreme Court, Hall, Henderson and Taylor, were especially desirous to settle for North Carolina a system of law founded upon the common law of England, modified, indeed, to some extent, to suit the peculiar nature of our institutions and altered in many respects by legislative enactment. In this attempt they were greatly aided by the argument of a bar which had no superior, and hardly an equal, in any State of the Union. The truth of this will readily be acknowledged by those who read the names of Archibald Henderson, William Gaston, Thomas Ruffin, Moses Mordecai, Gavin Hogg, Peter Brown, Joseph Wilson and Henry Seawell. Some of these were succeeded a few years later by Duncan Cameron, Francis L. Hawks, George E. Badger, Thomas P. Devereux, Frederic Nash,

Samuel Hillman, William H. Haywood, Patrick Henry Winston, of Anson, and James Iredell. To be Chief Justice of this Court and to be worthy of the position—what honor in the gift of the people approaches it—what opportunity for good equals it? Taylor, Henderson, Ruffin, Nash, Pearson, Smith, Merrimon, Shepherd, Faircloth, Furches, Clark, *nomina venerabiles et clarissima.*

It is said that on one occasion Bishop Ravenscroft attempted to reprove the Judge because of his religious or want of religious views, whereupon the Judge retorted, "It were well for you to have your horse hitched before you crack your whip." Unfortunate for the religion of a hundred years ago, its doctrine was proven orthodox by apostolic blows and knocks, and the ecclesiastics persisted in churching such men as Thomas Jefferson, who were by no means scoffers or unbelievers, but earnest seekers after the truth, and who today would be worshiping at the same altar with Chas. W. Eliot, Edward Everett Hale and William H. Taft. Religious tolerance did not characterize an age taught by blind mouths whose lean and flashy songs grate upon their scrannel pipes of wretched straw, an age which disfranchised Catholics and forbade Hebrews owning real estate—and yet it was such an age that pronounced the boldness of the Chief Justice to be skepticism. A Christian poet had not then sung—

> "There lives more faith in honest doubt,
> Believe me, than in half the creeds"—

Nor had we learned that if the normal man is let alone, to him the Heavens will declare the glory of God and the firmament show His handiwork. Such a man will finally come,

like Napoleon, to declare, "I know men and Jesus Christ was no mere man," or like Webster to exclaim, "No man can read the Sermon on the Mount and be an infidel." Whatever in youth Henderson believed or disbelieved, he finally became a constant worshiper at and communicant of old Saint John's Church, and his pew may now be seen by the curious pilgrim to this ancient shrine.

Judge Henderson was a large man physically. He weighed 212 pounds and was more than six feet in height. His hair was dark and profuse and well roached back from his forehead. His eyes were large and gray and in repose appeared rather heavy, says Dr. Kingsbury, seeming to be "in-taking rather than giving out." His head was large, strikingly symmetrical, with forehead high, broad and exquisitely chiseled. Like all the Hendersons of his day, he had a remarkable length of chin, and his mouth was fixed well back in his head. This gave occasion to a witty Rowan farmer to remark when the Judge presided the first time in Salisbury, that he thought Baldy Henderson's mouth was far enough back in his head, but the Judge had swallowed his. When the fiery Bishop Ravenscroft removed to Williamsboro, Judge Henderson did not call as soon as he might and the stern Bishop, who was preparing his hebdomadal homily, made no further recognition of the belated visit than a turn of the head, at once resuming his task. The Judge withdrew and told his boys at the law school that he had been treated right for his discourtesy.

Judge Battle represents Judge Henderson as kind, affable and courteous, in domestic and social life. He possessed in no ordinary degree the love of his wife and children, and there was no man whose intercourse with his family was

better calculated to win their confidence and affection. To this day his memory is held in tender affection by his descendants, one of whom, now serving his State in the legislative halls, and but yesterday in the roar of battle burying a leg upon the red hills of Virginia, will, like Gunga Din, "dot and carry one till the longest day is done," and another, mingling the blood of Henderson and Scales, represented by the whole State, has but entered upon his career. Judge Henderson was a delight to his friends, and his fine conversational powers, aided by a strong and energetic expression, always drew around him a circle of admiring listeners. With the people of the State he was always a favorite. No better illustration of this could be furnished than his election on the first ballot by the Legislature, together with a personal friend but political opponent, over four other gentlemen of great name and extensive influence in the State, Taylor, Seawell, Murphey and Yancey. He filled no other offices than that of the Clerk of the District Court at Hillsboro, Trustee of the University of North Carolina and Judge of the Superior and Supreme Courts. One county and three cities in this and other States bear the name of Henderson, such an impression did this virile family make upon mankind.

On 13 August, 1833, the spirit of the Chief Justice passed to its reward. For him his contemporaries manifested both veneration and affection. A meeting of the bar, at which Adolphus Erwin presided and Burgess S. Gaither was secretary, was held in August, 1833, at Asheville, and after adopting the usual preamble, the resolutions draughted by Samuel Hillman, Esq., declared of the late Chief Justice that his life and character had been identified with the legal history

of North Carolina, his urbanity of manners, dignity of deportment, unspeakable honesty, unshaken independence and vigilant regard for every class of suitors, have maintained the universal respect and esteem of the profession, and his genius and talents have contributed much to erect a regular system of law and equity, adapted to our peculiar conditions, interests and institutions. A meeting of the Granville Bar was presided over by Judge J. R. Donnell and Hugh Waddell acted as secretary. The resolutions declared that "the judicial office in the government of laws is that in which the community have the profoundest interest, for in addition to the moral and intellectual elevation of him who fills it, is the respect felt for the laws themselves, and all good men deplore as a public calamity that such an office should ever be feebly filled, as to the mass of mankind the step is easy from a contempt for the organ to a contempt for law itself. As a judge, the deceased was of inestimable value to North Carolina. The genius, the learning, the firmness which characterized him, insured the faithful execution of the laws and commanded the universal confidence of the public." Judge Ruffin was making preparation to visit Chief Justice Henderson at Williamsboro when news of the latter's death was announced. At once, he hastened to Raleigh, and from the capital on 21 August, 1833, wrote to John L. Henderson, a son of the Chief Justice:

"There is a vacuum here which none can fill. Time (what cannot time do of good as well as of evil) will, I trust alleviate the pangs of sorrow I now experience, and sweeten the chalice which he has so lately embittered to you. Your father is gone now, but let his works live after him. Forget not his virtues, his purity of heart, his benevolence, his power-

ful and profound intellect, but while they are yet fresh in your mind, let all that he said or did be carefully and frequently thought of so that the impression on your own mind may be permanent, and you thereby keep him constantly by you as a counselor and guide."

The entire letter should be published as a model not only of elegance of diction, but of the love which bound together the two great Chief Justices, Ruffin and Henderson.

When the spirit of Daniel Webster was passing from earth, he signified his wish to be rolled upon his couch to the window that he might look for the last time upon the beautiful scenes surrounding "Marshfield," his country home, and that he might gaze once again into the honest eyes of his oxen which were driven near the bedside. When the spirit of the Chief Justice was passing from earth, 13 August, 1833, he requested his friends to permit him to gaze for the last time upon the scenes of his childhood, loved Montpelier, and the last words which he uttered, were these: "I have passed the portals and see nothing terrifying."

Such was Leonard Henderson, racy of the soil of North Carolina, bluff, honest, despising shams, thinking what he had a mind to and saying what he thought, worthy of his great name, a beacon light to guide you, Sirs, and me, and all generations to come, and an admonition to little men that hypocrisy and self-seeking and sycophancy and concealing one's honest opinions, are lies, hurtful not alone to the State but more hurtful to the man himself. With Mansfield he could say, "I wish popularity, but it is that popularity which follows, not that which is run after. It is that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means."

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